

# CONSTRUCTION CONTRACTING ESSENTIALS FOR COMMERCIAL PROPERTY OWNERS AND DEVELOPERS

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## About the Author and Context of this White Paper

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I am not an attorney. However, over the past 40 years, I have led teams to deliver almost \$7 billion in commercial construction projects for my clients and have served in many roles, including real estate investment banker, developer, and general contractor. Since 2009, I have exclusively represented commercial and institutional owners in their major capital building programs across the US and abroad. However, the preponderance of my professional experience has been in Texas. Therefore, I have written this white paper fundamentally with commercial projects in mind, and have provided several examples relating to Texas legal statutes because that is what I am most familiar with. Laws vary from jurisdiction to jurisdiction, so I highly recommend that my readers consult with an attorney who is familiar with applicable laws.

Nevertheless, it is important to distinguish some similarities and differences in residential and commercial contracting. Large-scale multi-family residential projects, such as apartments and condominiums, employ technology and industry practices similar to commercial projects with a comparable magnitude of cost. Not only do single-family homes and smaller multi-family projects often utilize different nomenclature and practices, but the actors are also very different. Most commercial contractors and service providers do not engage in single-family residential markets. Likewise, most residential architects, homebuilders, and subcontractors do not engage in commercial projects.

In many jurisdictions, single-family residential construction is governed by statutory and regulatory requirements unique to the residential sector, including minimum warranties, customer disclosures, resolution of claims, and state licensing or registration requirements. Residential developers typically do not employ the standardized design and construction contract forms that we see on commercial projects, due to regulatory reasons and the nature of individual consumer transactions, as compared against commercial markets where the parties are presumably more sophisticated in business acumen and are expected to understand and employ best industry practices.

Residential construction also introduces nomenclature that is much different from that of commercial projects. For example, a “custom” homebuilder contracts directly with the customer to construct the improvements built on property owned by the customer. Whereas “speculative” or “tract” homebuilding is a specialized area where residential construction intersects with real estate development. In such cases, the developer often acts as its own general contractor, using banks to fund construction costs with interim construction loans, and then repaying the debt when they sell completed homes to individual buyers.

For most of the 20<sup>th</sup> Century, construction contracting was fairly straightforward. With some exceptions, architects and contractors were generalists and could execute a broad range of work with their in-house resources. The owner would contract with an architect or engineer who would draw up the construction plans. The owner would use those plans as the basis of competitive bidding amongst general contractors and enter into a contract with the low bidder (usually for a lump sum). The contract documents would consist of a written agreement between the owner and the architect and a separate one between the owner and the general contractor. Most times, these contracts were only a few pages long. Once construction commenced, the architect would continue providing services to the owner by supervising

construction and advising the owner about deficiencies in the work, which was performed almost entirely by the general contractor's internal workforce. In those days, there were only a handful of highly specialized, first-tier subcontractors such as structural steel erectors, electrical, and mechanical trades.

During those simpler times, the owner would often engage a lender to provide interim financing so that the owner could make progress payments to the contractor based on the architect's certification of work completed. In those days, the lender's involvement was usually limited to reviewing the pay applications submitted by the contractor and approved by the architect. On larger commercial projects the lender would send their own inspector (usually the loan officer) to the site in order to verify that construction progress had advanced enough to justify the amount requested on the contractor's application for payment. Once the project was completed and accepted by the owner, the bank would "take out" the interim construction loan by refinancing into a long-term or "mini-perm" note, secured by a deed of trust on the property.

Over the last quarter-century, the design and construction industry has become highly specialized, wherein designers, builders and technical consultants tend to operate only in their own areas of expertise. Today developers and owners of commercial buildings are holding many more contracts with highly specialized technicians for very specific services and scopes of work. Significant changes in banking and financial markets as well as real estate development techniques have driven changes in the way commercial buildings are delivered. Owners want their completed buildings faster than ever before. They also want the ability to make changes as late as possible without impact to schedule or cost. Private sector owners are now faced with daunting decisions in structuring their construction projects. Not only must owners discern and select the best designers and builders to deliver the proper result on time and in budget, they must also decide how their contracts will be structured. These decisions enable owners to better manage their project risks. Well written contracts with the right project partners, together with best industry practices enable a greater likelihood of predictable results for owners.

In a "normal" market, owners are usually in the best negotiating position prior to the time when the contractor is selected. This is to say that contractors are more likely to "win the work" by offering more competitive terms to owners. On the other hand, the owner is at a disadvantage when they defer decisions concerning pricing until after the contractor is selected and work has commenced. At that point the owner has lost considerable negotiating leverage and the result will almost always be less favorable. As of this writing, five years after the COVID pandemic beset the world, these conditions still apply. Even though construction costs have literally gone through the roof, I have seen many reputable contractors willing to compete for work as much as possible based on price. The caveat here is, *the lowest price on bid day usually turns out not to be the best value for the owner*. When negotiating the contract for construction, owners are advised to carefully consider all of the outcomes they need in order to meet the project requirements or conditions of satisfaction, including but not limited to: schedule, cost, quality, safety, longevity, sustainability, etc.

## I. INTRODUCTION

Contracts *do not* deliver completed buildings. People do.

Contracts *do* influence the three fundamental priorities for every owner contemplating capital improvements: time, money and quality of work. Therein lies the importance of having a good contract and avoiding the risks of a poorly written one.

In a post-pandemic world, some owners are no longer in a position to negotiate construction contracts from a position of strength. When the pandemic first hit the US in early 2020, construction starts, prices, and overall demand dipped in response to health risks and widespread chaos. However, that price drop lasted for only a few months. Since the third quarter of 2020, the demand for construction materials, equipment and labor have continued to outstrip available supply. When that happened, many owners asked themselves, “Is hurting worse than waiting?” Owners who forged ahead with their projects have experienced painful cost premiums, a lack of material availability and schedule slippage. Owners who paused their projects in hopes of more readily available products and affordable prices took a gamble that did not play out well. At the time of this writing in early 2025, construction material availability and spot market price hikes are not as drastic as we saw during the COVID pandemic. However, new aggressive government policies on international trade, tariffs, and immigration will likely have a profound impact on the availability and cost of construction materials and labor, thereby increasing project risks for owners. Now more than ever, owners are seeking every advantage to negotiate construction contracts in a way that mitigates their risks of cost escalation, schedule slippage, and quality problems.

This white paper is meant to provide owners and their program managers with an overview of different types of construction contracts and how they apply to private sector projects. I will address key terms that owners should consider, with emphasis on contract terms for preconstruction and construction phase services.

## II. PROJECT DELIVERY METHODS

In this paper, the term *project delivery method* is meant to include the entire project continuum, starting with conceptualization, planning, and preconstruction, through construction, closeout, and turning over the fully operational new facility to the owner.

I have grouped project delivery methods into two fundamental categories:

**Design—Bid—Build (DBB): The owner contracts separately with an architect for design services and a contractor for construction services.**

**Design—Build (DB): The owner contracts for consolidated design and construction services under one agreement with the “Design Builder.”**

From a big-picture perspective, most construction contract structures will fall into one of these delivery methods.

### A. DESIGN – BID – BUILD

Note that at the time of this writing, the widely used industry acronym DBB refers to the “Design – Bid – Build” continuum and the delivery method by the same name. Laypeople and industry professionals alike use the DBB acronym loosely, without any intent to imply that “Bid” indicates the owner’s requirement to award the work to the contractor who submits a sealed bid with the lowest price. Many times, the owner awards the work to the contractor offering the “best value” which includes pricing as well as other selection criteria such as the firm’s relevant project experience, strength of the team, professional references, safety record, financial stability, litigation history, etc. In many cases the owner will select a Construction Manager at Risk during preconstruction solely on the basis of qualifications, and perhaps a quotation of fee on the cost of work, with the notion of awarding the construction contract to the CMAR when the time comes to build.

Under the DBB method, a design professional initiates the design work. Next the owner selects a contractor and enters into an agreement to build the improvements according to the designer’s construction documents (plans, specifications, etc.). As the DBB acronym implies, the project is usually designed before the owner selects the contractor and authorizes them to start building the project. In DBB, one or more architects along with other design professionals produce the drawings and specifications independent of the contractor. Most commercial developers and owners prefer entering into a single contract for professional design services to streamline the process and have one party (the architect) responsible to coordinate the work of the many design specialists and assume responsibility for a complete design. There are exceptions to this rule of thumb, which follow below.

- In large, complicated, high design projects such as museums and concert halls, an owner may contract with a Design Architect (DA) to develop design concepts and prepare early design documents. Then, the owner will contract with an Architect of Record (AOR) or Production Architect as they are sometimes called, to prepare the construction documents based on the DA’s design drawings. The architect preparing the construction documents customarily engages technical

designers as sub-consultants, including civil engineers, structural engineers, mechanical and plumbing system engineers, electrical engineers, lighting designers, low voltage designers, building envelope consultants, acousticians, commercial food service designers, interior design consultants and landscape architects.

- Owners of large high-rise office buildings often contract with separate architects for the design of the core and shell of the building and the interior fit-out. Owners of large campus-type building programs often contract with one or more design professionals for civil engineering design and site utilities to within five feet of building perimeters. This can give the owner more control over the civil engineer. However, when this happens, the owner takes on the responsibility of coordinating the civil engineer's work with that of the architect.
- In recent years, I have encountered a couple of architectural firms that choose not to take on civil engineers as subconsultants, with the philosophy that the architect is an expert in building design. In contrast, the civil engineer is an expert in the physics involved with developing the building site. These architects have told me they are comfortable taking on the responsibility of coordinating the work of designers with which they are very familiar, such as the MEP systems. However, they do not have a comfort level coordinating civil engineering and site utilities because they lack familiarity with these disciplines.

Unless an owner is a highly experienced commercial construction manager with the internal resources to do so, or with the contracted services of a reputable third-party Owner's Program Manager, I recommend the single design contract model. Under this arrangement, the architect is entitled to recover their reasonable cost of supervising and coordinating the work of their subconsultants. This is a good value for owners who do not have the experience and internal resources to supervise, manage, and coordinate the tedious details across multiple design disciplines.

Once the owner decides whether to contract with a single general contractor or multiple prime contractors, they must decide upon the contractor selection process, which will be covered in Section III, "Contractor Selection" below. For clarification, it helps to ask the person whether they truly mean *bid* in the sense of awarding the work to the lowest bidder. This is also referred to as "hard bid," wherein the owner is optimizing for the cheapest price, which means project schedule and construction quality are potentially less critical. Or do they intend to *select* the contractor who will likely deliver the best value to the owner, and then *negotiate* the contractor's price for the work? If this is the case, the owner's selection criteria include several factors, including cost control, construction quality, speed to market, and building performance in the years following project completion.

When the project design has advanced the level of detail to a particular stage of completion the owner then selects the contractor(s) to construct the improvements in accordance with the architect's plans and specifications. At this point, the owner must decide whether to use one general contractor or utilize multiple contractors to perform specific scopes of the work. The latter of these is referred to as the "Multi Prime" method of construction

contracting. Each of these two arrangements has advantages and risks that should be carefully considered.

If the owner is heavily experienced in commercial construction and has the internal capability to manage, supervise, and coordinate a Multi Prime project, they can often realize savings by eliminating the middleman and not contracting with a single general contractor. When the owner lacks sufficient internal project management capabilities, it may engage a third-party Program Manager to provide these services for a fee. I will provide more information below relating to the Program Manager's services.

There are several risks to the Multi Prime method. Managing, supervising, and coordinating the work efforts of multiple prime contractors is very challenging. The fundamental risk is, each of the prime contractors will have a natural tendency to work in silos with their own vernacular, and not communicate with one another about who is doing what work when, and where on the site that work is occurring. Unless the owner's construction manager is an expert in team building and facilitating a good communication model to break down the silos to ensure everyone is constantly aligned on the current state and the detailed plan to achieve the end state, numerous problems are sure to arise along the way. Examples of such issues include errors, rework, waiting, and other wastes that cost everyone precious time and money. Without proper leadership, the prime contractors and architects are sure to point fingers when problems arise, and not accept responsibility for expediting a remedy. Therefore, owners should weigh these risks very carefully before opting to forego a single general contractor to coordinate all the work and assume responsibility for delivering a properly completed project.

The most significant advantage to the owner in DBB is the ability to control the project design and costs. During preconstruction, the owner can obtain reasonably accurate cost estimates, even in a post-pandemic economic environment. By working with the designers during preconstruction, the owner can study design options for cost and performance impacts and direct the designers to make modifications in the project's best interest. The design phase should culminate in a set of construction documents that embody what the owner needs and wants, with a reasonable expectation that contractor pricing will fall within the established budget parameters.

With the greatest respect for professional architects, I always recommend owners seek a third-party professional cost estimator's services during the preconstruction / design phase. The reason is, architects do not actually bid or procure the work, and therefore do not possess the skill to produce an accurate estimate of cost. Usually, the architect's cost estimating method is to search back into their historical project files and look for something that approximates the one they are trying to estimate today. They take the contractor's final pay application for that *other* project and divide the cost by the number of square feet to give them a unit price (\$ / SF) to apply across the board to *this* project. Unfortunately, that method does not accurately account for many important details that can significantly impact cost. Examples include specific site conditions (i.e., cut – fill – haul off – import select fill), custom mill order structural steel; quantity details, specific or proprietary systems, adjustments for time, transportation costs, contractor's general conditions, or differences in pricing from one geographic market to another. By contrast, third-party quantity surveyors

and cost estimators (either an owner's program manager or general contractor) are constantly in the market bidding and procuring work, so they have ready access to pricing information to provide owners with up-to-the-moment data in specific geographic markets.

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### Quick Review

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DBB / DSB is ideal for owners in these situations:

- Owner needs to closely control the design during preconstruction. Single contract runs between the owner and architect.
- Owner has limited internal resources to supervise and manage the contractor's activities in the field. Contract runs between owner and a single contractor, or CM at Risk.
- Owner can potentially save money, by eliminating the general contractor as "middleman". Very complicated to execute. Owner must have the experienced resources to manage multiple prime contractors' activities in the field.
- Hard Bid - Owner has to "commoditize" for best price and take the lowest bidder. Potential risks to the owner include quality and schedule, as well as the risk of change orders if the architect's documents are not 100% error free.
- Negotiated Work - Owner selects the contractor(s) from a field of other candidates vying for the work. Selection is based on professional qualifications and possibly an estimate of contractor's general conditions and % fee on the cost of work. After contractor selection, the work is bid out to the market of subcontractors. Final cost of work is negotiated. Can be either lump sum, or cost plus a fee. If owner and contractor cannot come to an agreement on cost of the work, the owner may cut ties and move on to the second ranked candidate identified during the selection process.

## B. DESIGN – BUILD

Under this method, which is also sometimes called “Turnkey”, the owner enters into an agreement with a Design - Build entity that assumes responsibility for both the design and construction of the improvements. When implementing the DB method, the owner sees the designer and builder as being one and the same. The business structure of the Design - Builder may take on one of the following forms:

- Joint venture between a design firm to prepare the documents and provide CA services and contractor(s) to implement the work;
- General contractor subcontracts with an architectural firm for design services;
- General contractor uses in-house architectural services to design the project;
- Architect subcontracts with one general contractor or multiple prime contractors to implement the work.

Generally speaking, the entity with the lead role in the Design – Build continuum takes on the most risk. For example, in a straightforward tilt wall concrete warehouse project the general contractor will have the most risk, whereas the designer will have comparatively less risk. On the other hand, in a highly technical project where the owner is primarily concerned with the performance of the completed building, the designer carries more risk because the system design and component specifications are highly technical and will heavily influence the final result.

DB offers several advantages to the owner, the primary one being a single source of responsibility for properly delivering the completed project error free, on time. When problems inevitably arise during the design or construction of a DB project, the owner is not caught in the middle of the finger – pointing between the designer and contractor about whose fault it is. In the DBB model, such problems are often fraught with the owner playing referee in protracted arguments between architects and contractors attempting to force the other party to assume responsibility for corrective action.

Another advantage of DB over other delivery methods is a better likelihood of finishing on time. Aside from the single source of responsibility discussed above, DB teams save a significant amount of time by not having to bid and buy out the job to the open market which can easily take six to eight weeks or for a complicated project. In some cases, DB can be an effective means of “Fast Tracking” a project by mobilizing construction with early release design packages, before the full construction documents are 100% complete. I will discuss Fast Tracking in more detail below, in Section II.C.1.

DB can be a very good solution for Owners who need to maintain flexibility during the design stage, after the contract has been executed. Developers often utilize the DB method on their build – to suit projects for others as end users.

Another advantage is that of potential cost savings through an economy of consolidated service under one roof. The owner is hiring one entity, not two, to provide design and construction services.

The Design Builder’s pricing mechanism is predicated upon a formal written document known as the Owner’s Project Requirements (OPR). Many owners do not have the internal

resources to prepare an OPR. In those cases, the Design Builder must know some baseline information from the owner, including their design standards and cost requirements. Without this information the Design Builder has no criteria with which to price their contract. Therefore, unless the owner provides very specific design requirements, they may unintentionally relinquish control of project costs and the design, only to receive a completed project that does not look or perform as the owner intended.

Owners who lack detailed design standards or internal resources to prepare the OPR may opt to contract with a third-party owner's Program Manager to prepare these documents for a fee. The fee to prepare the front-end documents would surely be less costly than the design phase fee of the Design-Builder. Nevertheless, owners considering DB should bear this in mind.

Integrated Project Delivery is a form of Design-Build, but the owner has much more control over the project in IPD.

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### Quick Review

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DB is ideal for owners in these situations:

1. Want a single entity to assume responsibility for the design, construction and delivery of a completed, fully operational building;
2. Seeking potential fee savings by contracting with a single entity;
3. Need to maintain flexibility during the design phase, i.e. design – build for others.
4. Seeking superior predictability of schedule.

Owner's seeking to take advantage of the foregoing, and avoid the risk of losing control of cost and design, owners contemplating DB should have the following in place, and make them a part of the Owner Design-Builder Agreement:

- a. Owner's Project Requirements (OPR) document;
- b. Detailed design standards / requirements;
- c. Either in-house or third-party resources to oversee the entire preconstruction process, to ensure the DB team is adhering to the OPR, design criteria, managing cost, quality and schedule.

## C. VARIATIONS

Though most contracting arrangements fit well in one of the two aforementioned project delivery methods, two variations are sometimes encountered in both.

### 1. Fast Track

Fast Track is a project wherein construction commences before the design is completed. Design-Build can be a type of fast-track project. However, not all fast-track projects are design/build. As discussed above, the DB method calls for the owner to contract with a single entity that furnishes both the design and construction of the improvements. Construction often commences before the design work is completed, making it a fast-track project by definition. Sometimes, DBB arrangements are fast track as well.

When an owner is willing to sacrifice some control in order to shorten the project duration, fast tracking is a way to expedite the completed project. Properly done, fast tracking can also save the owner considerable costs. However, because the plans have not been completed when the owner negotiates the terms of the contract for construction, the owner is usually unable to negotiate a firm contract price at that time. In such a situation, pricing is often determined by an agreement after construction is underway. This means that the owner is having to negotiate with the contractor over a lump sum price or guaranteed maximum price (see discussions below) at a time when the owner often has the least amount of leverage. Given this disadvantage for an owner in DBB, the owner could opt for DB, with the benefit of dealing with a single entity who will be responsible for the entire project.

Another fast-track method, known as Integrated Project Delivery (IPD), gives owners much more control over the design, costs, and the final outcome. This unconventional delivery method originated in the 1990's at Scripps Health in San Diego, CA. IPD is not for every owner, nor is it well suited for every team of designers or builders. Formulating a successful IPD team starts and ends with selecting the right partners, or Project Alliance, as it is also called. A well-written IPD contract will directly influence the business transaction, and is meant to establish a positive professional relationship and working environment. Corporate culture and leadership style significantly impact employees' core values, work habits, and daily behaviors. The importance of looking deep into the corporate culture of your potential PA partners cannot be overemphasized. Patrick O'Connor, a law partner at Faegre & Benson, LLP, puts things into perspective more eloquently than I can:

*One has to be careful about making too much out of the characterization of IPD agreements as "relational." Relationships, trust, and collaborative undertakings certainly play a heightened role in IPD contracts. This makes them unique and a bit more unpredictable than traditional contracts, as they call upon parties to perform differently from what is expected under more traditional design and construction arrangements. Little benefit is gained, however, by treating IPD agreements as a different kind of contract for interpretation and enforcement purposes. While IPD agreements are*

*founded upon different expectations concerning the parties' rights, responsibilities, and rewards than traditional design and construction contracts, they should be interpreted and enforced employing the same legal principles.<sup>1</sup>*

Many robust studies are available with examples and details of truly stellar IPD results. In past presentations and White Papers, I have anecdotally shown how one of my recent IPD teams worked through time constraints and design/construction challenges to bring in a hospital project, six months faster and \$76 / SF less than on comparable Design-Bid-Build hospital projects.<sup>2</sup>

The IPD team could possibly be the biggest factor in determining the success of a project. CBRE Healthcare and other groups have facilitated engagements where contractors, architects and owners believe they are ready for IPD only to find themselves slipping right back into traditional project delivery methods. Just saying you are using IPD does not make it accurate. The attitude and culture must be sincere to ensure success.

## 2. Construction Management

Construction Management is sometimes viewed as a separate type of project delivery method, but it can be adapted for use in both the DBB and the DB methods.

Over the years, architects have become less willing to assume the responsibility (with its associated liability) of acting as the owner's representative in connection with the projects they design. Many commonly used Owner-Architect contract templates impose an obligation on the architect to act as a neutral party in connection with disputes between the owner and the contractor. Those same contracts often limit the architect's responsibility for actively monitoring the contractor's work. As construction has become increasingly complex, many owners have realized that they need skilled professional assistance in monitoring and coordinating the work of the architect and the contractor, and assisting and advising the owner in connection with the decisions and determinations an owner must make on a typical construction project. With the recognition of this need, **construction management** emerged in the 1980s.

Two types of Construction Managers (commonly known as "CMs") exist. As the name implies, the **CM Agent** renders professional management and coordination services as the owner's agent under a contractual arrangement. The CM Agent does not actually perform or assume responsibility for the construction work itself. However, The CM Agent may or may not contract with subcontractors or suppliers. Unless the CM Agent contracts with subcontractors and suppliers, they do not control the means and methods of said contractors or subcontractors. Most times, the owner will contract directly with either a general contractor who enters into subcontracts and is responsible for delivering the completed work, or with multiple prime contractors who, collectively, cover the entire work. This method is also sometimes referred to as **Multi Prime**.

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<sup>1</sup> O'Connor, Jr. Patrick J., Minneapolis, MN. 2009

<sup>2</sup> Watts, George, *Only as Strong as Your Contract*, Dallas, TX. 2018

The **CM at Risk** is a broker, who actually enters into subcontracts and supply agreements and assumes the risk for delivering the completed work, with very little or none of it being done by their own forces. In contrast, a General Contractor performs the preponderance of the work with their own forces and may subcontract certain specialty trades such as erecting structural steel; mechanical; electrical; plumbing and fire protection. A CM at Risk and a General Contractor can have similar roles: 1) Both enter into subcontracts with and coordinate the work of Trades, and 2) both assume the responsibility and risk of delivering the completed improvements. The difference is that a General Contractor is usually not engaged until after design is complete, whereas the CM at Risk is typically brought to the table during preconstruction to advise the owner and design team, provide cost estimates, schedule modelling, constructability advice, and overall assistance in planning the project. The CM at Risk can also provide "value engineering" services to help the owner identify issues during the design process that will provide savings in delivering the completed project. Once the construction commences, the CM at Risk moves into the traditional role of a general contractor, but with a greater understanding of the overall project because of its participation in the pre-construction phases.

Regarding the DBB method, the owner may contract with an Owner's Program Manager, or "CM" according to the Construction Managers Association of America (CMAA), to act as the owner's representative and assist in management and coordination of all facets of the project from the initial negotiations with the architect through the actual construction and final acceptance of the improvements. Although we sometimes see DBB projects in which the Owner Contractor Agreement is characterized as a "construction management agreement", in such a situation the CM at Risk is really nothing more than a general contractor.

One encounters construction managers (more accurately, Owner's Program Managers or CM Agents) with some frequency on DB projects. Often, the Program Manager assists the owner in developing the design criteria, which is crucial in controlling not only the design, but project costs as well as long term performance of the completed project. Unless the owner is relatively sophisticated and experienced with regard to construction, the Program Manager can serve a very valuable role in assisting and monitoring the work of the design/build contractor on behalf of the owner. While it is conceivable that a DB contractor could be characterized as a CM at Risk, that is an inaccurate characterization because of the design function of a Design - Builder.

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## Quick Review

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### Fast Tracking

1. Is ideal for owners who are willing to give up some control, to expedite delivery of their project to the market.
2. DBB is sometimes a type of fast-track project.
3. DB is sometimes a type of fast-track project.
4. Not all fast-track projects are DB or DBB.
5. CM at Risk is a type of fast-track project.
6. IPD is a method of fast-tracking, although care must be taken to ensure the parties, and project, are well suited to this delivery method.

### Construction Management

1. CM Agent - Renders professional management and coordination services as the owner's agent. Does not perform or subcontract the work, nor do they dictate means and methods.
2. CM at Risk – Broker of construction services, subcontracting the preponderance of the work, and assuming the risk for delivering the completed project.

### III. CONTRACTOR SELECTION METHODS

Once the owner has determined the type of project delivery method it will use in connection with the project, the owner must decide how it will select the appropriate contractor. Owners on private works projects are free to choose any number of selection methods from informal word of mouth through formal, competitive sealed bids or proposals.

For decades, governmental entities utilized a formal procurement method known as competitive bidding. Since the late 1980's most jurisdictions have become savvy enough to understand that competitive bidding tends to yield inferior results because that method commoditizes the work (optimizing for cheapest price – on bid day) but ultimately results in change orders which break the budget, as well as inferior quality, schedule problems, and often times, legal problems as well. Public procurement processes have largely evolved over the years to enable many of the selection methods enjoyed by private owners.<sup>3</sup>

In cases where an owner does not wish to employ the formal, rigid, competitive sealed bid method, they will be selecting the contractor predicated on preordained criteria set forth in a Request for Qualifications (RFQ), or Request for Proposal (RFP) which includes some element of price, or a hybrid that combines the two (RFQ / P). These are all forms of “negotiated work” contracts, which give the owner much more leverage and control than in a hard sealed bid situation. Selection criteria often include factors such as the number of years the contractor has been in business; value of completed relevant projects (with references); volume of projects currently underway (with references); projects completed in the local jurisdiction (with references); strength of the project team; strength of corporate leadership; bonding capacity; financial strength; safety record claims and litigation history, etc. Sometimes, the owner will publish a Request for Proposal (RFP), which includes not only the candidate's qualifications, but also certain pricing elements such as Fee on the Cost of Work, General Conditions / General Requirements. Even in cases where the owner has an ongoing relationship with a contractor, there are still benefits to fostering competition amongst qualified competitors and bringing market forces into the selection and negotiation process with an RFQ / P. At the very least, the owner should require some type of written qualification statement and / or proposal, and then conduct interviews with short listed candidates.

When the selection method involves competitive bidding, the owner will furnish a bidding package to those contractors from whom bids are being solicited. Even with the less formal selection methods, the same bidding package must be provided to each contractor from whom a proposal is solicited, so that the owner will be comparing "apples to apples" when reviewing candidates' written responses.

The detailed content within the bid package or RFQ / P varies depending upon specific project attributes as well as the project delivery method and pricing structure the owner selects. In a DBB arrangement, the owner looks to its in-house construction manager or a third-party Program Manager to prepare the proposal package for the selection of the contractor, although occasionally the architect prepares the document. When seeking proposals for a DBB project, it is common for the owner to have the design team onboard and underway. In those cases, the conceptual

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<sup>3</sup> While public works contracting is beyond the scope of this paper, the State of Texas' specific requirements for contractor selection relating to public works projects may be found in Chapter 2269 of the Texas Government Code. [TEX. GOV'T. CODE §2269.001, *et seq.*] and Chapter 51, Subchapter T of the Texas Education Code.

renderings and drawings are made available to candidates vying for the work. In a DB arrangement, the owner looks to its in-house construction manager or a third-party Program Manager to prepare the RFQ / P would ideally include the Owner's Project Requirements (OPR), but at a bare minimum it must absolutely include the owner's not-to-exceed construction budget and baseline design requirements.

While the owner's technical Program Manager or construction professionals and designers assemble the bid documents or RFQ / P, the owners legal counsel should carefully review the package to ensure that it contains an accurate description of the terms and conditions of the owner's proposed contractual agreement.

**Special Note:** Whenever possible, the package should contain the actual construction contract document forms ("the Contract") that the owner will require the contractor to execute. If the bid documents or RFP / Q stipulate that the candidate's submission of bid or proposal signifies they have fully informed themselves as to the content and terms of the Contract and their acceptance thereof, this simplifies the process of completing the Contract, after the contractor is selected.

Owners wanting the most favorable contract terms are best served by including those terms or contract forms in the bid or proposal packages. Once the owner has committed to a contractor and a contract price (or similar terms), the owner has lost considerable negotiating leverage with the rest of the terms of the contract. Frequent mistakes I have observed in bid or RFQ / P packages include the following:

1. Inadequate disclosure of contract terms.
2. Referring to an industry form document that does not serve the owner's best interests.
3. Allowing architects to prepare construction contracts. With all due respect to design professionals who are very knowledgeable about many aspects of construction, drafting contracts is a business practice or law practice — not the practice of architecture.
4. Allowing the contractor to prepare construction contracts. Owners who do this expose themselves to potential risks that they cannot control, because the contractor is sure to create a document slanted heavily in their own favor.
5. Waiting until after receiving the bid or RFP / Q responses and selecting the contractor is to consult a lawyer to draft the contract.

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## Quick Review

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1. Sealed hard bid – Mostly implemented by public / government entities optimizing for lowest price. Reveals the “lowest qualified bid” – on Bid Day. Often, these projects go over budget due to contractor change orders; result in inferior quality because of lower skill level; schedule slippage due to slower progress and more frequent equipment breakdowns (older / unmaintained equipment is always cheaper than new).
2. Negotiated work – implemented by both public and private sector entities, optimizing for the best value through a combination of professional qualifications and pricing. The goal is to deliver the best final result (on time; in budget; meets the owner’s requirements of quality and building performance).
  - a. RFQ
  - b. RFP
  - c. RFQ / P
3. Bid Package or RFQ / P should be prepared by experienced industry professional.
  - a. Always include the actual contract documents (not industry templates or generic forms) plus exhibits, including language to be used for the specific project.
  - b. Never let the architect or contractor prepare the construction contract.
4. Contract preparation – Either get an experienced construction attorney or qualified Owner’s Program Manager to prepare the contract documents. Most owners would never sign loan documents or real estate purchase documents without a third party’s professional representation. The owner’s construction contract is just as important.

## IV. MEANS OF COMPENSATION (PRICING STRUCTURES)

A significant factor in determining the type of contract document to be used on a project and its content is the means of contractor compensation. This factor is closely related to the method of selecting the contractor. Owners have several pricing structures to choose from.

### A. LUMP SUM (also referred to as Stipulated Sum)

A lump sum or stipulated sum is a fixed contract price. This pricing structure is usually employed when the contractor is selected by competitive bidding. The contractor agrees to furnish the work for a fixed price that is typically paid in periodic payments based upon stages of completion or other milestones identified in the contract.

In a lump sum contract, the owner may not know the amounts the contractor agreed to pay its subcontractors and suppliers. So long as the contractor pays its obligations arising under the contract, the contractor may not be obligated to account to the owner for where the money goes. However, this is not always the case. More and more owners are requiring contractors to enter into "open book" lump sum contracts that provide visibility of subcontractor pricing, and the contractor is required to account for all job costs. Even if the contract is not open book, owners should require the contractor to some standard of accountability for its use and dissemination of funds paid out under the contract. This is particularly true on projects that are not bonded, as the owner may be subject to liability for subcontractor mechanic's lien claims including those arising under Chapter 53 of the Texas Property Code.<sup>4</sup>

### B. UNIT PRICES

In cases where the work is clearly defined but quantity is unknown or uncertain, a unit price contract may be utilized. Occasionally, the architect or engineer of record will state the quantities in their bidding documents. Contractors submit their bids on the basis of price per unit of each material specified in the bidding documents. This is sometimes viewed as a type or form of lump sum contract in which the contract price is based upon some identified unit of measurement. For example, in paving contracts, the price may be stated in dollars per cubic yard of hot-mix asphalt or concrete.

### C. COST PLUS

In the southwest US, a very popular pricing structure is "cost-plus" wherein the contractor is compensated based upon the actual reimbursable cost of the work plus a fee to compensate the contractor for its profit. The mark-up or fee can be stated as a percentage of the costs or it may be a flat fee to be paid in accordance with the contract terms (usually paid out on a proportional basis with the periodic payments to the contractor based upon the cost of work incurred during the payment period). Unless the owner intends to give the

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<sup>4</sup> For construction contracts entered into on or after January 1, 2022, HB 2237 brought significant changes to §53.056 of the Property Code. For claimants who are not the original contractor, the effect was to greatly simplify lien perfection requirements on commercial projects. Under this revision, the claimant no longer has to give statutory notice to the owner and original contractor in two separate months for the same unpaid work or materials. Rather, the claimant must give notice only once to the owner and original contractor not later than the 15<sup>th</sup> day of the third month after each month in which the unpaid labor or materials were provided. Tex. Prop. Code §53.056(a-1)(1)(A).

contractor the equivalent of a blank check, most cost-plus contracts also have some cap or "guaranteed maximum price" (see discussion below under Section VI. C – Contract Sum).

Any of these pricing structures can be used in conjunction with any of the methods of selecting a contractor described above. The lump sum or unit price compensation is used most often in a competitive bidding context; however, it may be negotiated between the owner and contractor. On the other hand, cost-plus is usually employed in a negotiated contract. Nevertheless, the contractor's fee (or mark-up) and the guaranteed maximum price can be competitively bid just as easily as the lump sum. Any of the pricing structures can also be used in conjunction with either of the project delivery methods described above.

While these pricing structures can be adapted for use in either delivery method and can be used in conjunction with any of the methods of selecting the contractor, they do have a very significant impact on the contract terms an owner needs in its contract documents. This is particularly true when defining the contractually allowable, reimbursable cost of work in a cost-plus contract.

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### Quick Review

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1. Lump Sum (Stipulated Sum) – Fixed price contract where the contractor is usually selected by some means of competitive bidding. Owner usually has no visibility of contractor's job cost details, overhead, profit, etc.
2. Unit Prices – Contract sum is based on specific, identified units of measure. Contractors submit bids based on price per unit of material, as specified in the architect's or engineer's bidding documents.
3. Cost Plus – Contract sum is based on the reimbursable cost of work, plus a contractor's fee to compensate them for a reasonable profit on the job.
4. Any of these pricing structures can be used with any method of selecting a contractor (sealed hard bid; RFQ; RFP; RFQ / P).
5. Any of these pricing structures can be adapted for use in either delivery method (DBB; DB; CM)

## V. CONSTRUCTION CONTRACT DOCUMENTS

Big picture – construction contracts form the structure and processes which, if properly led, will enable teams to proactively communicate and implement best practices to minimize problems, deliver the expected results, and keep projects out of trouble. Construction contracting requires the parties to complete many distinct documents which differ between delivery methods, reflecting the owner’s choice of contractor selection method and pricing structure.

It comes as no surprise that across the Architect / Engineer / Contractor / Owner (AECO) Community, each of the parties have different motivations for including certain things in their contracts. At the same time, each party is optimizing for identical things for themselves:

1. Managing their risk;
2. Not taking on overly burdensome tasks;
3. Not overpaying;
4. Service providers and contractors earning a fair profit;
5. Ensuring the project is completed on time;
6. Establishing a standard of quality / predicable results.

When the contract is finalized and executed, it is imperative that all parties are aligned on expectations. Legal theory presumes that all parties who have executed contracts understand and agree to all of the terms therein. In the real world, even in the best of circumstances, surprises and unintended outcomes happen in construction. This can create problems amongst the parties which often impacts the project in detrimental ways.

New developers and construction industry professionals alike will benefit from knowing the two most important contract tools available: *The doctrine of incorporation by reference* and *flow-down provisions*.

**The doctrine of incorporation by reference** states that when one document refers to another document, the intent of the parties is to incorporate all of those documents together, as a whole.<sup>5</sup> This is most often seen in the in the prime construction contract running between the owner and prime contractor, as well as in subcontracts which incorporate project plans, specifications and other related documents in to the written agreements signed by the parties.<sup>6</sup> To proactively address the risk of conflict between the contract form and documents incorporated therein, or a highly likely conflict between the architect’s drawings and project manual (also called a “spec book”) it is a good idea to utilize an “order of precedence” clause detailing what language and what document controls in the event of such a conflict.

**Flow-down provisions** relate to subcontractors, where incorporation by reference ensures they are bound in the same manner and to the same extent as the general contractor is bound to the owner.<sup>7</sup> This includes not only drawings and specs, but also the mechanism for payment, handling

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<sup>5</sup> See: *Black’s Law Dictionary* (2<sup>nd</sup> pocket edition).

<sup>6</sup> See: *AIA Document A201 – 2017 General Conditions for Construction*, §1.1.1 and *ConsensusDocs 200 Standard Agreement and General Conditions Between Owner and Contractor (Where Contract Price is a Lump Sum)* 2007, ¶2.4.4.

<sup>7</sup> See: *AIA Document A201 – 2017*, §5.3, and *Subcontract* at ¶1.

claims and disputes during and after performance of the contract. In this way, the construction manager's or general contractor's contractual requirements *flow down* to the trades who provide labor and materials to the project.<sup>8</sup> Flow-down provisions benefit not only the owner, but also the general contractor and subcontractors – especially when several parties are involved in the dispute. Logically, when all subcontractors are required to comply with the same requirements of the general contractor there will be fewer surprises and problems with general project expectations; how to deal with unforeseen conditions; delays; progress payments; final payment at the end of the project; and processes available to resolve disputes during or after performance of the contract.

Here are a few examples of how flow-down works to everyone's benefit:

1. A prime contractor would never agree to accept payments from the owner every 30 days, and then promise to pay their subcontractors weekly. The customary practice is for the prime contractor's subcontracts to include language committing to pay as and when the owner pays the prime contractor.
2. When it comes to withholding payment, as in the case of non-conforming work, the owner has the right withhold from the contractor a portion of the payment requested, until that error is corrected. In turn, the contractor should be allowed to withhold a corresponding amount from any subcontractor whose nonconforming work was the root cause of the owner withholding payment.
3. If the parties find themselves at odds and are unable to resolve the dispute on their own, proper flow-down language will ensure all of the parties and their claims are brought into the same dispute resolution process to avoid wasted time and expenses on separate lawsuits, cross claims, or arbitration proceedings.<sup>9</sup>

Notwithstanding the foregoing benefits, when subcontractors agree to be bound by the general contractor's same duties to the owner, they can potentially take on additional risks and financial exposure.<sup>10</sup> Lately it has been more common to see subcontractors insist on reciprocal flow-down provisions, wherein the prime contractor takes on the owner's obligations in making timely payments, etc. Although subcontractors may perceive flow-down as an increased risk, they are not giving up their fundamental protections available under bonding statutes<sup>11</sup> and mechanic's lien claims.

#### A. INDUSTRY / STANDARDIZED CONTRACT FORMS

Numerous construction industry trade groups have attempted to create contract document templates for use on various types of projects. For the most part, these contract forms are balanced and contain the essential terms of agreement for particular projects. However, they are not written from the perspective of the owner and they should be modified to meet the owner's particular needs and to reflect the owner's relative bargaining power in its negotiations.

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<sup>8</sup> Incorporation by reference can differ from flow-down provisions. However, the terms are often used interchangeably in the industry.

<sup>9</sup> See: *AIA201-2017* §15.4.4, and *Subcontract* ¶18 and ¶24.

<sup>10</sup> Brennan, Daniel S., *The Construction Contracts Book, How to Find Common Ground in Negotiating the 2007 Industry Form Contract Documents* (2<sup>nd</sup> ed. 2008), Chapters 1 and 2.

<sup>11</sup> See: Miller Act, 40 U.S.C. §3131, 3133(b)

It should be noted that most of these forms, particularly the forms promulgated by the American Institute of Architects, are copyrighted. Parties should purchase the forms from the appropriate vendor or one of the authorized electronic document programs offered by the vendors.

1. [American Institute of Architects \(AIA\)](#)

AIA forms are probably used more often than any other standardized construction contract forms in the US. There are several reasons for the popularity of these forms. First, they are, for the most part, well-drafted templates that reflect best industry practices and attempt to allocate risks and responsibilities in a reasonably fair and workable manner. They are also widely used by architects because, not surprisingly, they favor the architect more than any other form contract promulgated by a trade or industry group. Finally, a surprising number of owners, even on large projects, allow their architects to prepare the contract documents or fail to engage an experienced professional to draft and / or negotiate the construction contract. Accordingly, the AIA forms are used on many projects, often with little or no modification favoring the owner.

Nevertheless, because of their widespread use and acceptance, AIA forms are an excellent starting point to begin preparing construction contract documents. Although most AIA forms are rather lengthy, the terms are reasonably well known to architects and contractors and, except for modifications requested by the owner, there should be relatively few discussions or difficulties in negotiating the terms of the printed language in the forms.

**Special Note:** An owner's representative or legal counsel should modify the AIA's baseline template forms because they do not necessarily reflect the best terms an owner can achieve in its negotiations with design professionals and contractors.

For more than a century, the AIA Documents Committee has been constantly revising and updating their standard documents to keep pace with advancements in the industry. They update all of their template forms on an approximate ten-year rolling cycle. Several of the most heavily used forms (the Owner/Contractor "Stipulated Sum" and "Cost Plus" forms and the Owner/Architect Agreement forms) were most recently revised in 2019. Many owners, design professionals, and contractors will no doubt continue using the 2017 and 2007 editions of those AIA forms for several years. Indeed, there are still contracts in circulation that are written on the 1997 editions and even on the 1987 editions, although the AIA website no longer supports these earlier versions. There are significant differences between the 1987, 1997, 2007, 2017 and 2019 editions of the AIA forms. Accordingly, Owners should be very careful in reviewing proposed contract documents written on AIA forms to make sure the contracts are not written on earlier editions with which they (and their counsel) are not familiar or comfortable. A list of the current versions of the primary AIA form documents is attached hereto as an Appendix.

2. [Associated General Contractors \(AGC\) / ConsensusDocs®](#)

For many years, one of the largest trade groups for general contractors, the Associated General Contractors (AGC), promulgated their own set of construction project forms. Several of those forms were jointly produced with AIA. However, in 2007, AGC joined a number of other construction-related trade and industry groups to promulgate and endorse a comprehensive family of standard forms for design and construction, commonly referred to as ConsensusDocs. The stated aim of the ConsensusDocs forms was to provide model language drafted with an industry-wide participation for the benefit of all segments of the construction industry. They have attempted to take a "collaborative" approach to contracting.

ConsensusDocs forms were drafted with relatively little input from the major industry groups representing owners/developers and design professionals. Contractors are in the business of assessing and controlling risks arising from construction and monetizing those risks in their contract price. Contract documents should not inhibit an owner's attempt to allocate risks in a manner that best reflect that owner's particular needs. Accordingly, although the ConsensusDocs forms have received widespread publicity, the jury is still out on whether they will be adopted on a widespread basis by owners, developers and design professionals.

3. [Engineers Joint Contract Documents Committee \(EJCDC\)](#)

The forms promulgated by the Engineers Joint Contract Documents Committee (which consists of several engineering trade groups) are also similar to the AIA forms, but do lean toward a more middle-ground approach between the parties. These forms are not as widely used or accepted as the AIA or AGC forms. However, it is not unusual to see them used on heavily engineered projects such as roads, bridges, manufacturing facilities, and power plants.

## B. TYPES OF CONSTRUCTION CONTRACT DOCUMENTS

Most of the content in this section refers to the AIA Family of Documents because they are most frequently used across the US at the time of this writing. Some of the more commonly encountered contract documents include:

1. [Program Management Agreement](#)

When an owner needs professional assistance in planning, developing, and coordinating a single project, or a complicated multi-year capital program consisting of many phases and multiple projects, the owner may contract with a Program Manager, sometimes referred to as a CM. The Program Manager may be called upon to assist the owner in the initial planning stages, acquisition of the site(s), the selection of the appropriate project delivery method(s), and the selection of the design professional(s) and the contractor(s). When multiple projects are involved, the Project Manager leads the teams across the many projects and coordinates the work at a detailed level on each individual project. This type of arrangement is commonly encountered in large institutional campuses (universities, health care, aviation) and in the public contracting context such as public-school districts, airports, and public transportation. A Program Management Agreement is typically a professional services type of contract in which the Program

Manager has no direct risk in the design or construction, but serves as an agent, acting on the owner's behalf while also providing advice to the owner.

## 2. Owner–Architect Agreement or Owner–Design Professional Agreement

Most commercial construction requires approval by a governmental agency or body before the commencement of construction, and also before the occupancy or use of the improvements. When construction takes place in a jurisdiction requiring one or more permits, the owner must submit plans prepared or "sealed" by a licensed design professional such as an architect or engineer.

The contract between the owner and the architect or other design professional is a professional service agreement that should clearly define the scope of the professional's work on the project in connection with design and administration of the construction contract, if any. As with all contracts, it should cover pricing, time of performance, dispute resolution, termination, insurance and indemnification, and many of the other terms which are found in the construction contract.

Many owner – architect agreements are written on forms prepared by the American Institute of Architects. As stated previously, the family of "Owner–Architect" forms intended to be used for design-select-build projects typically undergo periodic revisions about every decade.

The 2019 editions of the standard Owner/Architect Agreement forms were made available in 2020, and, as of October 31, 2018, the AIA electronic documents program stopped supporting the prior editions, including the 2007 editions that have been in wide use for the past fifteen years.

The most encountered form of agreement for architectural services is the AIA Document B101-2017. It is very versatile and, with some modification, can be used for large or complex projects. The 2017 edition of the B101 will likely continue to be the workhorse form of contract for architectural services.

**Special Note:** When using the AIA owner / Architect Agreement form, it is highly recommended that the owner revise the agreement to give the owner, rather than the architect, the ownership rights in the plans and drawings. Owners should not hesitate to make other changes in the AIA form when negotiating a contract with an architect, including an increased responsibility in advising the owner of problems with construction, a reduced role by the architect in making interpretations and decisions without the owner's consent or direction, and more stringent insurance and indemnification requirements. Further, owners should also consider whether the waiver of consequential damages contained in the standard AIA forms is in their best interests on any given project.<sup>12</sup> Owners should also exercise care in drafting contracts to make

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<sup>12</sup> In most jurisdictions, absent an agreement to the contrary, a party may recover both direct and consequential damages. **Direct damages** are those that flow naturally and necessarily from the other party's wrongful act. *Arthur Andersen & Co. v. Perry Equipment Corp.*, 945 S.W. 2d 812, 816 (Tex. 1997). **Consequential damages** are those that are directly traceable to the other party's wrongful act, but do not necessarily flow from it. *RAJ Partners, LTD. v. Darco Const. Corp.*, 217 S.W. 3<sup>rd</sup> 638, 646 (Tex App – Amarillo 2006, no pet.). In some jurisdictions, the architect may be held responsible if their breach of

sure that the definition of "basic services" includes all of those services that the owner expects from the architect (in most contract forms, an architect can obtain additional compensation for those services which are not among the enumerated basic services, known as "additional services"). There should also be provisions for termination of services by the owner that provides for reasonable compensation to the architect upon termination without unduly punishing the owner.

### 3. Owner – Contractor Agreement

The Owner–Contractor Agreement is often referred to as "the construction contract". In reality, it may consist of an agreement with a separate set of General Conditions (see below). It may also take several different forms depending on the type of project delivery method selected by the owner. For example, the AIA forms include separate contract forms for a lump sum or stipulated sum contract (A101–2017), a cost-plus contract with a guaranteed maximum price (A102 - 2017) or without a guaranteed maximum price (A103 – 2017), and a design-build contract (A141–2014). There are also AIA forms for abbreviated projects (*i.e.*, smaller projects that do not require the lengthy documentation of the other forms) (such as the A104-2017). In addition, AIA forms also include contracts for IPD projects (A195 – 2008) together with a special form of General Conditions related to IPD (A295 – 2008).

The primary focus of this paper will be on the typical clauses and terms in the Owner – Contractor Agreement, which will be covered below in a detailed discussion of key contract clauses and terms.

### 4. General Conditions

On larger projects, the Owner–Contractor Agreement may include a set of General Conditions which set out in greater detail the rights, responsibilities, and remedies of the parties to the construction contract. The AIA form General Conditions is the A201. This form was revised for 2017. As of October 31, 2018, the AIA no longer supports the 2007 edition of the A201. This means that hard copies of the 2007 edition cannot be purchased from AIA for authorized use and that the AIA electronic software program required to prepare the documents electronically will not allow parties to create documents from the 2007 edition (or from any earlier editions, for that matter). Parties somehow still using the 2007 edition of the A201 after October 31, 2018, may be violating the AIA copyright.

**Special Note:** Care should be exercised in using the A201 because it includes a waiver by all parties, including the owner, of consequential damages arising under the contract. (See discussion of "consequential damages" as discussed in footnote 5 on the preceding page.)

### 5. Construction Management Agreement

As previously noted, there are two types of construction managers: CM Agent and CM at Risk. The contract forms for these arrangements differ considerably.

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contract results in increased construction costs and delay costs. Owners should be leery if the architect insists they waive such rights.

*a. Construction Manager as Agent*

The CM Agent contract is a services agreement that calls for the CM to provide assistance and advice to the owner during various phases of the construction project. In most cases those services include assisting the owner during the design and pre-construction phases of the project. In some cases, the CM Agent is required to act as the owner's representative during the construction phases and to take an active role in supervising and coordinating the work of the prime contractor(s).

The AIA form for the CM Agent agreement is the C132 – 2019 Owner / Construction Manager as Advisor Agreement (formerly the C132 – 2009 version which the AIA no longer supports). The AIA has also published a general conditions document with special terms relating to construction managers, to wit: the A232–2009 General Conditions. The A132–2019 Agreement between Owner and Contractor is also meant to run with the CM Agent contract documents. However, these special forms do not have to be used, and the other AIA forms can be easily modified to accommodate the owner's use of a construction manager on the project.

*b. Construction Manager at Risk*

The CM at Risk contract is a combination of the CM Agent agreement that calls for the construction manager to provide advice and assistance to the owner during the pre-construction phase (the “Preconstruction Services Phase”), and the general contractor agreement which calls for the construction manager to construct the improvements in accordance with the contract documents (the “Construction Phase”).

Typically, the “Construction Phase” is triggered by the parties agreeing to a Guaranteed Maximum Price Amendment which finalizes and fixes the pricing and contract time requirements. However, construction can commence when the Owner issues work authorization amendments for preliminary scope prior to finalizing the GMP.

The AIA forms for the CM at Risk agreement are the A133–2019 for Cost-Plus with a Guaranteed Maximum Price and the A134–2019 for Cost-Plus without a Guaranteed Maximum Price. The AIA does not have a standard form of Owner/CM at Risk agreement where the Contract Price is a stipulated amount.

The standard AIA General Conditions (A201–2017) document is intended to also be used with either the A133–2019 or the A134–2019.

*c. Letters of Intent/Preliminary Agreement*

An owner's willingness to pay an amount of money for the improvements (usually in an amount unknown to the contractor during the negotiations) is one of the main sources of the owner's leverage over the contractor in many contract negotiations. However, an owner's desire to take possession of the completed improvements as soon as possible is often an equal source of leverage by the contractor over the owner. When an owner is in a hurry, the contractor often has the upper hand in the contract negotiations.

When the contract negotiations drag out and the owner and contractor begin to get anxious about starting construction, there is always a great temptation to jump the gun. In those situations, a contractor may insist on the owner providing some type of letter of intent or some preliminary agreement in order to "get started." While such letters may be necessary in some situations, they can pose significant risks to owners and should not be provided without careful consideration. For example, a contractor may have to place a custom order to have a special item fabricated. The supplier must commence fabrication immediately in order for the contractor to complete the improvements according to the owner's schedule. The supplier will probably require some type of commitment from the owner to the contractor as a condition to commencing with its special fabrication. Other legitimate circumstances may call for some type of early commitment on the part of the owner. In these cases, owners who make early commitments should go into the transaction with eyes wide open for risks and consequences.

Practically speaking, once the owner commits to the contractor and authorizes preliminary construction work to commence, the owner loses much of its leverage over that contractor. Therefore, it is not in the owner's best interest to authorize the contractor to proceed before all parties have executed the contract documents. In cases where this is not possible, the owner must forge ahead, understanding the risks and accepting the consequences.

From a legal standpoint, letters of intent can be risky as well. If the letter is nothing more than an expression of present intent to award a contract, the letter may be nothing more than an "agreement to agree," which is not an enforceable agreement.<sup>13</sup> However, if the letter of intent contains sufficient terms to evidence the existence of an agreement, the courts may supply missing terms, such as a reasonable price.<sup>14</sup>

If the letter of intent is non-binding, it is a rather meaningless document. On the other hand, if it contains sufficient terms, a court may uphold it as an enforceable agreement — an agreement which almost certainly will not contain the protection for the owner afforded by the negotiated construction contract. Accordingly, it is rarely in the owner's best interest to provide such a letter of intent or preliminary contract. To the greatest extent possible, owners should resist the temptation to commence construction or provide letters of intent before the contract has been fully negotiated.

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<sup>13</sup> *Scott v. Ingle Bros. Pacific, Inc.*, 489 S.W.2d 554, 556 (Tex. 1972).

<sup>14</sup> *Bendalin v. Delgado*, 406 S.W. 2d 897, 900 (Tex. 1966); *Texas Oil Co. v. Tenneco, Inc.*, 917 S.W. 2d 826, 830 (Tex. Ct. App – Houston [14<sup>th</sup>] 1994, no writ).

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### Quick Review:

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1. Frequently used industry standard contract forms:
  - a. American Institute of Architects (AIA) – forms are updated on a rolling 10-year basis.
  - b. Associated General Contractors (AGC) ConsensusDocs®
  - c. Engineers Joint Contracts Documents Committee (EJCDC)
2. Frequently used types of contracts:
  - a. Program Management Agreement – where the owner contracts with a 3<sup>rd</sup> party as its representative and agent.
  - b. Owner / Architect Agreement (or Owner / Design Professional Agreement) – for design, preconstruction and construction administration services. AIA Document B101 – 2017.
  - c. Owner / Contractor Agreement – for preconstruction and / or construction phase services.
  - d. General Conditions – Sets forth the rights, responsibilities, and remedies of the parties to the contract.
  - e. Construction Management Agreement
    - i. CM as Agent – AIA Document C132 - 2019
    - ii. CM at Risk – AIA Document A133 - 2019
3. Letters of Intent – highly discouraged.
  - a. If it is a non-binding “agreement to agree” it is not enforceable.
  - b. If it is binding upon the parties, the letter of intent will still not provide owners with the protection and remedies available under a fully drafted and properly executed contract.

## VI. STANDARD CLAUSES AND TERMS IN CONSTRUCTION CONTRACTS

This section focuses on key clauses and terms which private – sector owners should include in their construction contracts. The list is not intended to be exhaustive and owners are strongly encouraged to consult with experienced industry professionals and legal counsel when drafting construction contracts to meet their particular needs. Most AIA standardized contract forms include these clauses. However, many of the terms discussed herein will need to be inserted by owners because they are not included in the AIA's standardized forms.

### A. SCOPE OF THE WORK

This clause describes the work or services to be performed by the contractor. In a design-select-build setting, the description of the work should refer to and identify the contract plans and drawings and bind the contractor to construct the improvements in accordance with those contract documents. Because no plans or drawings are ever perfect, the contract should contain language which imposes on the contractor the duty to perform that work which is "reasonably inferable" from the contract documents as "being necessary to produce the intended results." Contractors will object to this, because they want to limit their responsibility to the "indicated results" as shown in the architect's documents (even if the documents contain errors)!

Scope of work provisions are much easier to draft when the plans and drawings are complete at the time the construction contract is negotiated. However, when the design is not complete at that point in time (which happens on a fast-track project), the scope of the work can be difficult to define. In such a case the provision must reflect that the plans and contract documents are not complete, and that the contractor is obligated to perform the work as may be required by documents which will be furnished at a later point in time. Of course, there may be additional negotiations relating to Contract Time and Contract Sum at the point in time at which those plans and contract documents are finally completed.

In a design/build or construction management contract, the scope of the work needs to specify the services which the owner requires the design/build contractor or CM to perform. On a design/build project, it is very important that the owner provide the design/build contractor with sufficiently specific and complete design criteria or requirements to ensure that the improvements which are designed and constructed are consistent with the owner's needs and desires. Reference should be made to these criteria or requirements in the definition of the scope of the work.

On projects involving manufacturing facilities in which the design/build contractor is responsible for delivering an operational facility, the owner should seriously consider imposing an obligation on the design/build contractor to design and build a facility that meets specific performance criteria. This should be included in the terms relating to the contractor's scope of work.

### B. CONTRACT TIME

Every contract should state that "time is of the essence" and should impose some reasonable time limitations on the part of the contractor to complete its performance. Deadlines may be imposed at various milestones during design and construction. The most

significant milestone is "substantial completion." While contracts may define this concept differently, it usually means the point in time at which the owner may take possession and assume the benefits of the improvements. It should be defined in the contract in as objective a manner as possible. It can, for example, require the issuance of a certificate of occupancy from the appropriate governmental entity; however, the issuance of such a certificate should not be conclusive because the real issue is whether the owner can enjoy the use and benefit of the improvements.

Another important milestone is "final completion", which should also be defined. Under Texas statutes relating to deadlines for filing mechanic's lien affidavits, final completion is defined as "actual completion of the work, including any extras or change orders reasonably required or contemplated under the original contract, other than warranty or repair work."<sup>15</sup> That is a good definition to use in the construction contract because it has implications for when an owner may safely make final payment without the risk of valid lien claims being subsequently perfected, unless the owner has previously received a notice of claim from a potential lien claimant.

In the event of a delay in completion of construction, an owner may recover those damages which are the "natural, probable, and foreseeable consequences" of the contractor's conduct.<sup>16</sup> However, the fact or existence of the damages must be sufficiently certain.<sup>17</sup> Therefore, an owner can probably recover the increased costs associated with servicing the interim debt on the construction loan during the delayed period. However, the owner may have difficulty establishing lost profits from using the improvements, particularly if the owner had never made a profit on a similar operation before. Even if the owner can establish a sufficient basis for the existence of lost profits, the owner may have difficulty establishing the amount of the damages. Accordingly, it is usually in both the owner's and contractor's best interests that a "liquidated damages" clause be included in the contract so that the parties will understand the risk of delay and the owner will be more likely to recover a reasonable amount of damages in the event of a wrongful delay.

When drafting a liquidated damages clause, it is important to remember that the clause must not be deemed to be a penalty provision but must represent a reasonable attempt to quantify damages that would otherwise be difficult to ascertain or estimate. (Please refer to footnote 5 above, for more detail on liquidated damages and consequential damages). In other words, the amount must bear some reasonable relation to the monetary damages the owner might expect to incur because of the delay.

Because the owner's exposure to damages is usually the greatest for the failure to reach substantial completion by the contract date, most liquidated damage clauses call for the damages to be assessed for the contractor's failure to reach substantial completion. If an owner can identify a real exposure to damages for the contractor's failure to reach other milestones, the contract could also provide liquidated damages for that exposure.

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<sup>15</sup> TEX. PROP. CODE ANN. § 53.106 (3).

<sup>16</sup> *Mead v. Johnson Group, Inc.*, 615 S.W.2d 685, 687 (Tex. 1981).

<sup>17</sup> *Vance v. My Apartment Steak House, Etc.*, 677 S.W.2d 480, 484 (Tex. 1984).

### C. CONTRACT SUM

Owners and contractors alike tend to focus most of their attention on this particular clause in the construction contract. For a lump sum contract, the clause is usually straightforward to draft. However, for fast-track contracts where the plans are not complete when the contract is negotiated and finalized, the Contract Sum may be an open term which is subject to modification upon the occurrence of future events. When the final price is yet to be determined, the contract should reflect the parties' agreement on how the final price *will* be determined and the factors or considerations that *will* be used to conclude the final price.

Terms relating to the Contract Sum are considerably more complicated in a cost-plus type of contract. Such a contract should define the Cost of the Work which will be reimbursable under the contract; set forth the amount of or manner in which the contractor's fee or other reimbursement will be determined; set forth the guaranteed maximum price (GMP), and clearly state that all such compensation and reimbursement is subject to the GMP.

In defining the Cost of the Work, pay careful attention to what type of costs will be reimbursed by the owner. The more specific the description -- the better for the owner. In some cost-plus contracts, the contractor will add line items for "general conditions" or "general requirements" or "overhead". Sometimes this is compensated as a fixed amount within the GMP or computed as a percentage of the Cost of the Work. When the contract includes these types of recoveries for the contractor, the owner should carefully examine the list of items reimbursable under the definition of the Cost of the Work and make sure that the contractor is not "double dipping" by being able to pass on expenses as Cost of the Work which would otherwise fall under the category of overhead or general conditions.<sup>18</sup>

The Contractor's Fee can be a flat amount, or it may be based upon the amount of the Cost of the Work (*e.g.*, a percentage of the Cost of the Work). One of the problems with basing the Contractor's Fee on a percentage of the Cost of the Work is that the contractor has little incentive to keep the costs down (his fee increases as the Cost of the Work increases). One of the most significant advantages to a cost-plus contract from an owner's perspective is that, by monitoring the costs and paying only the actual costs incurred plus some reasonable mark-up, the owner may benefit from significant cost savings. However, to reap this benefit, owners will sometimes seek to incentivize the contractor to keep the costs down by including a "shared savings" clause that allows the contractor to recover some additional fee based upon the difference between the final Cost of the Work and the Guaranteed Maximum Price (to the extent that such difference is a savings to the owner).

A Guaranteed Maximum Price ("GMP") is an essential term in a cost-plus contract. Without such a term, the owner has given the contractor a virtual blank check. To be effective, the contract must make it clear that the GMP is an actual, maximum compensation and not merely a budget or an estimate of costs (sometimes referred to as a "Control Estimate").

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<sup>18</sup> "General conditions" is a term with dual meaning. 1) It is a construction contract document that supplements the construction contract between the owner and contractor. 2) It is a term used by some contractors to describe the responsibilities of the general contractor that arise as a result of the General Conditions and the expenses incurred by the contractor in carrying out those responsibilities - both at the job site and home office.

These latter concepts expose the owner to cost over-runs. Therefore, such terminology should be avoided in the construction contract. Care needs to be given as to how any such "cap" or maximum price is identified and defined in a Cost-Plus type of contract. At least one court has held that the term "approximate maximum cost" does not create a guaranteed maximum price, because the word *approximate* contemplates the "possibility of a reasonable variance between the stated figure and the final cost."<sup>19</sup>

Regardless of whether a stipulated/fixed sum or cost-plus with GMP contract is being used, owners should exercise care in agreeing to "allowances" or any "qualifications, conditions, and/or assumptions" to the Contract Sum submitted by the contractor and incorporated into the contract. These are called "open pricing" terms because they create exceptions to any fixed or guaranteed pricing in the contract.

Allowances are used when some portion of the required Work is being left to a future determination (*e.g.*, drilled pier overruns, spoils haul-off, owner finish selections, such as kitchen appliances, light fixtures, carpet and wall coverings). Allowance terms usually provide that, if the costs exceed the amount of the respective allowance, the owner will be responsible for any such increase. This, of course, creates an exception to the fixed or guaranteed pricing in the contract. Therefore, owners are best served when allowances are kept to a minimum in the construction contract.

When plans and specifications are incomplete or ambiguous at the time that the pricing in the contract is fixed or guaranteed, contractors will often seek to include in the construction contract a list of qualifications, conditions or assumptions on which the fixed or guaranteed pricing is based. The obvious purpose for such a list is to give the contractor the ability, when appropriate, to seek reimbursement for costs that exceed the fixed or guaranteed price. In some circumstances, this is fair and reasonable; however, it is subject to abuse. Any such list should be carefully reviewed to make sure that the information therein reflects the owner's understanding of what the contractor intends to provide, and that it does not contradict any specific term agreed to in the main body of the contract. As with other "open pricing" terms such as allowances, it is usually in an owner's best interests to keep the list to a minimum.

#### D. PAYMENT PROCEDURES

Most non-residential construction contracts call for payment to the contractor on a periodic basis (usually monthly), based upon the progress of the work and the value of the improvements completed through the applicable payment period. Typically, the contractor is called upon to prepare an application for payment covering the period through the last day of the month. The contract should give the owner sufficient time following receipt of a proper application for payment in order to make the periodic payment to the contractor.

Many commercial construction contracts call for the contractor's application for payment to cover work through the 25th day of the month. The problem with cut-off dates before the end of the calendar month is that the time periods for perfecting mechanic's lien claims in Texas and some other states are based upon the 15th day of calendar months. By not

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<sup>19</sup> *Syring-Workman, Inc. v. Colbert*, 532 S.W.2d 708, 710 (Tex. Civ. App.—Waco 1976, writ ref'd n.r.e.).

processing payment for the work at the end of the month, the contractor is not paid for that work in the next following month. In other words, payment for work performed on January 26 is processed in the payment application at the end of February. This means that the contractor may not get paid until the middle of March, for work put in place during the last five days of January. By the time the second- and third-tier subcontractors and suppliers get paid, a potential lien claimant may be pushing a lien perfection deadline. Accordingly, lien claims are sometimes filed on these projects even before payments have become past due. To reduce the risk of these claims, it is advisable to require the contractor to use the end of the calendar month as the payment cut-off date. This is to say that with the owner's agreement, the contractor would submit their application for payment on the 25<sup>th</sup> of the month, based on *projected* value of work in place through the last day of the month. This should not present a problem or undue risk to the owner as long as the parties are experienced professionals implementing best industry practices at all times.

The contract should describe the procedures for determining the appropriate amount to be paid to the contractor in the periodic payment. For a lump sum contract, the payment should be based on the relative value of the completed improvements as of the end of the payment period. In order to make this determination, there should be a "Schedule of Values" in which the entire Contract Sum is allocated among the various portions of the work. As part of the payment procedure, the contractor completes a form in which it assigns percentages of completion to each portion of the work and requests payment based upon those percentages. The Schedule of Values is a very important document because it dictates how quickly the contractor will receive payment. It is in the owner's best interests to make sure that the Schedule of Values reflects accurate allocations so that the contractor does not receive more payment than it is due at any given point in time. Accordingly, it is recommended that the Schedule of Values be agreed upon during the contract negotiations and attached as part of the construction contract. Any amendments to the Schedule of Values should have to be approved by the owner and the architect.

The other important consideration with regard to the periodic payment is whether the percentages of completion claimed by the contractor are accurate. The contract should call for the owner's representative or the architect to review the application for payment and inspect the work to determine whether the percentages are accurate and the amount requested for payment is actually due.

A cost-plus contract differs in that the contractor is submitting requests for payment based upon the reimbursable costs incurred during the relevant payment period. Accordingly, the contractor should be required to furnish adequate documentation that those costs were, in fact, incurred and the work performed during the period. The contract should discuss the time for payment of materials and equipment. In most cases payment should not have to be made by the owner until the materials or equipment are delivered to the project site. However, in the case of specially fabricated or ordered materials or equipment, the parties may have to agree to special payment terms.

Some cost-plus contracts also subject the contractor to payment limitations based upon a Schedule of Values. In that case, the Guaranteed Maximum Price or an estimated cost of construction is allocated among the portions of the work and the contractor is not allowed

to receive payment for incurred costs to the extent that those costs exceed the amount properly allocated under the Schedule of Values.

The contract should require the contractor to provide a bills-paid affidavit or a similar representation to the owner concerning its payment of bills and other obligations for work performed on the project. Similar bills paid affidavits should be required from the contractor's major subcontractors, together with conditional waivers of liens to the extent of payment received. In 2011, the Texas Legislature amended Chapter 53 of the Texas Property Code by adding Subchapter L, limiting the right to require a party to waive a lien claim prior to actual receipt of payment. In other words, lien waivers must be conditional upon receipt of payment unless payment has actually been received. Subchapter L also requires the use of statutory lien waiver forms.<sup>20</sup>

### **Contingent Payment Clauses: Pay When Paid and Pay If Paid.**

Contractors have an inherent risk of self – funding construction work including the cost of “extras” at the hands of their slow paying owners and developer clients. Prime contractors often shift this risk to their subcontractors by using “pay when paid” or “pay if paid” language in their subcontracts. Under these clauses, subcontractors receive payment for that particular scope of work when or if the general contractor receives payment from the owner. However, there are conditions to this rule, as I will briefly describe below.

#### **Pay When Paid.**

As the name implies, this clause only deals with the timing of the contractor’s obligation to pay their subcontractor. It does not absolve a contractor’s duty and promise to pay a subcontractor, even if the owner never pays. Such provisions are only enforceable for a “reasonable amount of time”.<sup>21</sup> There is a line of cases in which courts decided the issue in litigation involving the subcontractor, contractor, and owner. In *Moore v. Continental Gas Co.*, 366 F. Supp. 954 - 956 (W.D. OK 1973) the owner and contractor asked the court to allow their dispute to go to trial before addressing the issue of payment to the subcontractor based on a pay when paid provision in the subcontract. After two years and several delays of the trial date, the court finally concluded that a reasonable amount of time had passed and directed the contractor to pay the subcontractor. All of this is in spite the fact that the court had still not decided the matter between the owner and contractor; nor had the owner made payment to the contractor for the subcontractor’s work. In the *Moore* case, the court held that “the pay when paid provision did not shift 100% of the risk of the owner’s nonpayment to the subcontractor”. So, the question is – If the owner withholds payment to a contractor, what is a “reasonable amount of time” for that contractor to be allowed to delay payment to their subcontractor, in a pay when paid situation? In *Havens Steel Co. v. Randolph Engineering Co.*, 613 F. Supp. 514, 539 (W.D. MO 1985) the court stated that “a three month period (a calendar quarter) would be the maximum ‘reasonable time’ for delay”.

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<sup>20</sup> TEX. PROP. CODE ANN. §53.281, *et seq.*

<sup>21</sup> *Byler v. Great American Ins. Co.* 395 F.2d 273 (10<sup>th</sup> Cir. 1968).

### **Pay If Paid.**

A properly drafted pay-if-paid provision will shift 100% of nonpayment to subcontractors. It makes payment from the owner to the contractor a *condition precedent* to payment from the contractor to their subcontractor. Even if an owner never pays the contractor for a particular subcontractor's work, the contractor is not obligated to pay that subcontractor.<sup>22</sup> Subcontractors will always want to strike this clause, or revise them to pay when paid. Unfortunately subcontractors are not always in a position to negotiate away the pay if paid language. They are hardly ever in a position to ascertain the creditworthiness of the owner. In some states, pay if paid clauses are not enforceable. However - in Texas these clauses are enforceable, and they provide the contractor with an affirmative defense to claim for payment.<sup>23</sup> Fortunately for subcontractors, there are some exceptions and safe harbors. Exclusions apply to the following situations:

1. If the contract is solely for design services;
2. If the owner is withholding payment from the general contractor for nonperformance.

Even if a subcontractor agrees to pay if paid clauses in their contract, they are not waiving their mechanic's lien or bond rights.

Moreover, there is a line of case law establishing that a general contractor's surety is unable to rely on such a provision as grounds to refuse payment under a payment bond.<sup>24</sup> This line of cases addressing pay when paid and pay if paid clauses all turn on the issue of whether or not the parties to a subcontract *expressly agree* to shift the risk of owner nonpayment from the general contractor to the subcontractor. While such provisions are enforceable in Texas and other states, some states have declared that pay if paid clauses are "against public policy" and "unenforceable". These states include California, New York, North Carolina, and Wisconsin.

The contract should authorize the owner to withhold from such periodic payments an amount sufficient to cover defective work which has not been remedied, third-party claims (such as mechanic's lien claims) asserted against the owner or the property, and any other claims or damages for which the contractor is responsible, and which have been asserted against the owner or which the owner has incurred or is reasonably likely to incur. At any given point in time, including the point at which substantial completion has occurred, the owner needs to hold sufficient unpaid contract funds to cover the reasonable cost to the owner of completing any unfinished work or repairing any substandard work under the contract and covering any payment claims asserted by subcontractors and suppliers.

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<sup>22</sup> *MidAmerica Construction Management, Inc. v. Mastec North America, Inc.*, 436 F. 3<sup>rd</sup> 1257 (10<sup>th</sup> Cir. 2006), applying Texas and New Mexico Law.

<sup>23</sup> See: *Texas Business and Commerce Code*, Title 4: Business Opportunities and Agreements, Ch 56: Agreement for Payment of Construction Subcontractor.

<sup>24</sup> See: *U.S. ex. rel. Walton Tech., Inc. v. Westar Engineering, Inc.*, 290 F. 3<sup>rd</sup> 1199 (9<sup>th</sup> Cir. 2002) - holding that surety could not enforce "pay when and if paid" clause to avoid liability under the Miller Act); See also: *Moore Brothers Co. v. Brown and Root, Inc.*, 207 F. 3<sup>rd</sup> 717 (7<sup>th</sup> Cir. 2000); *U.S. ex. rel. T.M.S. Mechanical Contractors, Inc. v. Millers Mut. Fire Ins. Co.*, 942, F. 2d 946 (5<sup>th</sup> Cir. 1991); *OBS Co., Inc. v. Pace Const. Corp.*, 558 So. 2d 404 (FL 1990); and, *Hartford Accident & Indem. Co. v. Cochran Plastering Co. Inc.*, 935 So. 2d 462 (AL Civ. App. 2006).

Further, it is usually advisable for the contract to authorize the owner to withhold an additional sum (typically called "retainage") to mitigate the risk of the insufficiency of unpaid contract funds to complete any work in the event of a default by the contractor. It is common to see contracts with retainage requirements between 5% and 10% of each progress payment. Many such contracts provide that the retainage is paid upon substantial completion of the work, less a hold-back to cover the estimated costs of any completion or "punch list" work. However, under Texas law, an owner loses some measure of protection from mechanic's lien claims by subcontractors unless the owner complies with the "statutory retainage" requirements set out in Chapter 53, Subchapter E of the Texas Property Code.

To comply with Texas statutory retainage requirements, the owner must retain no less than 10% of each payment during construction and for a period of at least 30 days following "final completion." This 30-day withholding period may be extended if the Owner has received written notices from subcontractors with regard to claims for "contractual retainage" or other notices of claim from subcontractors.<sup>25</sup>

If the owner agrees to some reduction or early release or payment of retainage at substantial completion or at any other time before the 31<sup>st</sup> day after final completion, the owner will be liable for subcontractor claims up to the 10% of the contract that should have been retained, provided that the lien claimant timely perfects its lien claim (which may occur weeks or even months after the final completion of the work and any final payment has been made to the contractor). Accordingly, unless the owner wishes to assume this additional liability for derivative lien claims, owners in Texas are advised to comply with the statutory retainage requirements.

Many contractors in Texas resist strict compliance with the statutory retainage requirement concerning final completion, because it imposes a considerable burden on their cash flow. Final completion is a difficult concept to define in a large construction project, and 10% can be a significant retainage over such an extended period of time. Accordingly, it is very common for construction contracts to call for a release of retainage upon substantial completion. While owners may minimize their risk in these situations by requiring lien waivers and bills paid affidavits from the contractor and various subcontractors, such a premature release does expose the owner to liability for derivative lien claims, should they arise.

For final payment, the contractor should be required to furnish final bills paid affidavits and lien waivers from the contractor and its subcontractors and suppliers (or at least its major subcontractors and suppliers). The contractor should also be required to furnish all warranty information and documentation, including the proper assignments thereof, to the owner. The contract should provide that final payment by the owner is not a waiver of any claim the owner may have against the contractor for failure to complete the work or perform the work in accordance with the contract. Contractors will resist this non-waiver language, but owners should stand their ground, lest they forego considerable leverage with the contractor by releasing final payment.

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<sup>25</sup> TEX. PROP. CODE ANN. §53.057.

#### E. SUBCONTRACTING

There are several provisions relating to subcontractors that need to be in the owner's construction contract. One of the most significant provisions is a contingent assignment of the subcontracts which operates to assign the contractor's rights in the subcontracts to the owner in the event of the contractor's termination for cause by the owner.

Additionally, contracts should require the contractor to identify each subcontractor *before* the contractor enters into the subcontract and the owner should be given an opportunity to object to the subcontractor. Contractors should not be permitted to subcontract with subcontractors to whom the owner has made a reasonable and timely objection.

In cost-plus contracts, the selection of subcontractors is particularly important because those costs are passed on directly to the owner. Accordingly, those contracts should impose specific requirements on the contractor with regard to selection of subcontractors and the terms of the subcontract. For example, contractors should be required to select subcontractors based upon competitive bids from at least three qualified subcontractor. The subcontracts should be lump sum rather than cost-plus.

#### F. OWNER DIRECTED CHANGES IN THE WORK

The contract should include terms which allow for changes in the work directed by the owner (or its architect). Sometimes those changes are deductive in that they eliminate portions of the work; however, more commonly, the changes requested by an owner involve an addition to or change in the work for which the contractor will want more time and money.

When an owner or architect directs the contractor to take some specific action in connection with the work, a dispute may arise between the owner and the contractor on the issue of whether the action falls within the contractor's Scope of the Work or is an "extra" to the contract. It is very important to an owner that, when such a dispute arises, the contractor's progress in completing the work of the contract is not hindered. Accordingly, there needs to be a provision in the contract which requires the contractor to perform certain work directed by the owner or its architect even if there is a dispute concerning the contractor's obligation to perform without additional compensation or time. It is unreasonable to expect a contractor to agree to perform "any" work directed by the owner. Most contracts limit this requirement to cover only such work which is within the "general scope of the Contract." Nevertheless, if there is a dispute about "extra work", a warning to owners is for the contractor to continue advancing the baseline work independently of any resolution to the dispute about "extras". Otherwise, if the owner forces or allows the contractor to stop baseline work, the owner will unwittingly create a schedule delay which could be costly.

When the requested change in the work constitutes an extra to the contract or a reduction in the contractor's Scope of Work, the contract should provide a procedure and formula for making the appropriate change in the Contract Sum and Time. The contract should call for the owner, the contractor, and the architect to enter into a written "Change Order" when the parties agree to the change in the work and the amount of adjustment, if any, in the

Contract Sum and/or Time. The contract should provide that, when the Change Order is signed by the parties, it constitutes a final settlement of all matters relating to the change in the work, including any adjustment in the Contract Sum and Time. To facilitate the agreement concerning adjustments, it is recommended that the contract include a formula for computing the adjustments in the Contract Sum. For example, the contract could provide that, except as otherwise agreed by the parties, any adjustment will be based upon the Cost of the Work plus some specified percentage as overhead and profit. The contract should also provide that, when the parties are unable to agree to the adjustment of the Contract Sum or the Contract Time, or both, the owner may direct the change in the work by a written "Construction Change Directive" signed by the owner. The contract should further provide that, in the absence of an agreement with the contractor, the change in the Contract Sum will be computed according to the formula set out in the contract with regard to computing changes in the Work.

#### G. CONTRACTOR REQUESTED CHANGES / DEFECTIVE PLANS / DIFFERING SITE CONDITIONS

In addition to the potential problem that arises whenever the owner directs the contractor to perform specific work on a project (see discussion above), the contractor may determine on its own that "make-ready work" which is not covered by the contract must be performed in to complete the improvements as required by the contract documents. Typically, the contractor asserts that it has encountered physical conditions at the project site or other events or conditions beyond its control which differ from the conditions or information known or available to the contractor at the time the contract was executed; or the contractor asserts that the plans or other information furnished by the owner or the architect were defective or incomplete and the contractor was not adequately informed at the time the contract was executed. As with changes directed by the owner, the contract must provide for a procedure to handle these disputes or claims without disrupting the progress of the work.

The construction contract should include a requirement that, except in certain very limited emergency situations, a contractor may not perform work for which additional compensation or time extension will be sought without providing timely notice to the owner and/or the architect. The owner and its representative need the opportunity to determine whether such work actually needs to be performed, whether the contractor is justified in obtaining additional compensation or an extension of time, and the appropriate amount of adjustment, if any, before the work is actually performed.

Regarding contract changes, most disputes arise from two sources: alleged differing site conditions and defective plans. As a general rule, absent an express provision in a contract to the contrary and absent fraud, misrepresentation, or mutual mistake, a contractor who encounters concealed or unknown conditions at the project site (*e.g.*, adverse subsurface conditions like rock or groundwater) may not be entitled to an increase in the contract price or time to complete.<sup>26</sup> Not surprisingly, many construction contracts prepared (or agreed to) by contractors include specific provisions disclaiming this responsibility.

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<sup>26</sup> *Brown-McKee, Inc. v. Western Beef, Inc.*, 538 S.W.2d 841 (Tex. Civ. App.—Amarillo 1976, writ ref'd n.r.e.). With regard to the issue of "mutual mistake," while a contractor may be able to establish that neither the owner nor the contractor knew of the adverse subsurface condition, the contractor must be able to establish that the mistake involves the subject matter or

One way in which contractors can avoid the general rule on unknown or differing site conditions is to claim that the plans or other information furnished by the owner or its architect were inaccurate or incomplete. This issue also arises when the contractor asserts that it must perform additional work or that it is incurring additional costs or delays as a result of incomplete or inaccurate plans or drawings furnished by the owner or the architect.

**What if** the contract fails to address the accuracy of the architect's plans and the contractor's requirement to fully inform itself about differing site conditions? Is the contractor entitled to additional compensation and an extension of time?

A frequent example of this situation is where a sitework contractor's scope includes installing new underground storm lines, and tie into the City's line. The engineer's drawings show the City's storm line in a particular location and at a particular depth. When the contractor agrees to the Contract Sum and Contract Time, they rely upon the engineer's documents pinpointing the City's storm line. However, when the contractor actually begins excavation, the storm line is nowhere near where the drawing said it would be. The sitework contractor incurs additional excavation costs, and additional time to execute this additional work.

#### **Who is Responsible for the Accuracy and Completeness of the Design Documents?**

Under the Spearin Doctrine, named after the 1918 Supreme Court decision<sup>27</sup> the majority rule in the country is that an owner impliedly warrants the sufficiency of the plans and specifications supplied to the contractor by or through the owner. In other words, the owner is responsible for ensuring the plans and specifications are adequate for the project, even though the documents were prepared by the architect (also under contract with the owner).

If the contractor follows the owner's plans and specifications and a defect occurs because of an error or omission in the plans or specifications, the contractor is generally not liable for resulting damages. In some states, this is not at all straightforward. For example, a line of cases in Texas supports Spearin, which means that the contractor may be entitled to additional time and money.<sup>28</sup> However, there is another line of cases in Texas which holds that the owner does not impliedly warrant the sufficiency of the plans.<sup>29</sup> This would mean that it is the contractor's responsibility to run the line to the water main, at its own cost and within the original contract time.

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essence of the contract in order to be entitled to additional compensation. The Court in *Brown-McKee* expressly held that encountering unexpected rock was collateral to the construction contract and did not constitute a mutual mistake of fact.

<sup>27</sup> See: *United States v. Spearin*, 248 U.S. 132 (1918).

<sup>28</sup> See: *Newell v. Mosley*, 469 S.W.2d 481 (Tex. Civ. App.—Tyler 1971, writ ref'd n.r.e.); *Shintec Inc. v. Group Constructors, Inc.*, 688 S.W.2d 144 (Tex. App.—Houston [14th] 1985, no writ).

<sup>29</sup> See: *Loneragan v. San Antonio Loan & Trust Co.*, 104 S.W. 1064 (1907). See also: *Ruberoid Co. v. Scott*, 249 S.W.2d 256 (Tex. Civ. App.—Dallas 1952, no writ); *Emerald Forest Utility Dist. v. Simonsen Const.*, 679 S.W.2d 51 (Tex. Civ. App.—Houston [14th] 1984, no writ).

In 2012, the Texas Supreme Court rejected the Spearin majority rule and affirmed the line of cases which held that the owner does not impliedly warrant the sufficiency of the plans.<sup>30</sup> However, that case was decided on the basis of a contract which did not include language that might be interpreted to “fairly imply the owner’s guaranty of the sufficiency of the specifications... provided by the architect.” Not all contracts are silent on the owner’s responsibility for the errors and omissions of its design professionals.

To avoid uncertainty, ideally the construction contract should impose an express duty on the contractor to carefully study and review the plans for defects and report them to the owner or architect, and to examine the project site and be responsible for all conditions at the site. In reality, highly experienced competent contractors will assume unlimited liability for unknown site conditions or defective plans. However, there could be circumstances where certain unfavorable conditions (*e.g.*, subsurface conditions such as the presence of rock, underground utilities, hazardous substances, or water) are reasonably likely and the owner wants the contractor to assume (and price) the risks associated with those conditions. In any case, owners should require contractors to conduct site visits and examine the contract drawings and disclose on a timely basis any observed discrepancies or conditions that could result in a claim for additional compensation or time. As an alternative, the contract may provide that the owner expressly disclaims any warranty or representation as to the accuracy or completeness of the plans.

#### H. DELAYS AND EXTENSIONS OF TIME

Time is almost always an important issue on a construction project, because time is money. From the owner's standpoint, every day that the project is incomplete may mean a substantial loss of income, and market credibility. Additionally, the owner may incur interest charges on bank loans, as well as other costs if the construction duration is protracted. From the contractor's standpoint, additional time on the project has two consequences. First, additional work or work that takes additional time may prevent the contractor from achieving substantial completion within the Contract Time, subjecting it to liquidated damages or termination of the contract. Secondly, extended time on a project means additional General Conditions costs for the contractor.

When a contractor encounters a problem for which it is not responsible or which was caused by the owner or architect, they will surely ask for an extension of the Contract Time, and for an increase in the Contract Sum. The basis for such an extension and / or increase could include: direction by the owner or the architect to perform "extra" work; interference by the owner or the architect in the contractor's schedules (*e.g.*, requiring the contractor to shift work forces to accommodate other prime contractors); delays in approving work or changes by the owner or the architect; and stop work orders issued by the owner, architect or authorities having jurisdiction (AHJ's).

When the contractor requests an increase in the Contract Sum, it often has two components: 1) compensation for the additional work that may have been required or caused by the owner; and 2) compensation or reimbursement of expenses, damages, or

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<sup>30</sup> See: *El Paso Field Servs., L.P. v. Mastec N. Am., Inc.*, 389 S.W.3d 802,811 (Tex. 2012).

costs the contractor incurred by virtue of the delay or as a result of the additional time the contractor will be on the project by having to perform the additional work.

If a contractor has really been delayed through some act or omission of the owner, no judge in the land would say they are not entitled to an extension of the Contract Time. However, the extension of time should be limited to the extent that the delay actually prevents the contractor from achieving substantial completion. In other words, if the time taken to perform the work or the delay caused by the act or omission did not affect a critical path item and, therefore, did not really cause a delay in the contractor's ability to achieve substantial completion, the delay is not real and an extension is disallowed. Accordingly, the contract should limit extensions of time to only those delays that really have an impact on the contractor's ability to achieve substantial completion (or the other required milestones).

As for the issue of damages or an increase in the Contract Sum, it would be equally hard to argue that a contractor is not entitled to reimbursement for the costs of performing the additional or extra work required by some act or omission of the owner. On the other hand, should the contractor also recover damages resulting from the delay itself (that is, increased overhead or operational expenses for the additional time on the project or other consequential damages due to an increased time of performance)? Additionally, should it make a difference that the delay was caused by some intentional act or interference by the owner or some failure by the owner to take timely action (such as a delay in approving a "submittal"), as opposed to a delay that was caused by a "force majeure" event (*i.e.*, a cause beyond the control of either the owner or the contractor, such as adverse weather)?

In the absence of a provision in the contract to the contrary, the contractor may recover the costs of the additional work, if any, and monetary damages for the delays. To preclude a contractor's recovery of such damages, the owner should insert what is commonly known as a "no damages for delay clause." In this clause, the parties typically agree that, in the event of a delay resulting from any cause other than the willful act or wrongful, intentional interference by the owner, the contractor's sole recovery or remedy for any damages caused by the delay will be an extension of time. Many contractors will strenuously object to these clauses, particularly to the extent that they limit delay damages arising from some negligent act or omission of the owner or its design professionals (*i.e.*, an unreasonable delay in approving submittals or responding to a "request for information"). However, owners are sometimes able to negotiate a "no damage for delay" clause for delays that are the result of force majeure events, such as adverse weather or other causes beyond both parties' control. It may seem unfair that, on the one hand, the owner is able to recover damages for the contractor's failure to reach substantial completion within the Contract Time (particularly, when the contract calls for liquidated damages); but, on the other hand, the contractor is prohibited from recovering damages for delays caused by the owner. Nevertheless, these "no damages for delay clauses" are enforceable under Texas law.<sup>31</sup> Owners should make every effort to include such a clause in their construction contracts.

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<sup>31</sup> See: *Green Internat'l, Inc. v. Solis*, 951 S.W.2d 384, 386–7 (Tex. 1997); *City of Houston v. R.F. Ball Const. Co. Inc.*, 570 S.W.2d 75 (Tex. Civ. App.—Houston [14th] 1978, writ ref'd n.r.e.).

In a post-pandemic world, surely construction has been one of the most severely impacted industries. In February 2022, Russia invaded Ukraine, adding to the woes of global supply chains. Owners and contractors alike should protect themselves by carefully reviewing their contracts, in light of the health impacts of COVID-19 and its many variants, as well as unpredictable price hikes and supply chain disruptions. Following is an abbreviated list of contract provisions to bear in mind, in light of current industry challenges and constraints:

- Delay and disruption damages
- Force majeure clauses
- Notice provisions
- Termination clauses
- Escalation clauses
- Mobilization costs
- Insurance requirements
- Health and safety provisions

#### I. CORRECTING NON-CONFORMING WORK AND WARRANTIES

It is standard construction practice that the contractor agrees to correct work for a period of one year from the date of substantial completion. The contract should reflect such a correction period. The typical "one year warranty" in many construction contract forms, such as the AIA A201 General Conditions, is a one-year obligation to correct defective or nonconforming work. As a condition to final payment, it should also require the contractor to furnish all warranty information and assign all warranties from the subcontractors and suppliers to the owner. The contractor's warranty is basically a "no questions asked" obligation of the contractor to come out and repair or replace things that do not work properly within the first year after completion of the contract. When a contract includes such a provision, it is important that the owner not agree to language that limits the contractor's obligation to correct or be responsible for latent defects beyond that one year corrective period. In other words, the contractor should still be liable for latent defects that are not discovered or discoverable until after the one-year corrective period.

The contract should also include the contractor's express warranties regarding to the work. The appropriate warranties may vary from contract to contract. However, as a general rule, the contractor should expressly warrant that the work will be performed in a good and workmanlike manner and in accordance with the Contract Documents, will be of good quality and new, and will be free from defects not inherent in the quality required or permitted.

#### J. INSURANCE AND INDEMNITY

The contract should impose specific insurance requirements on the contractor. Insurance coverages that should be furnished in a typical construction project include:

1. *Comprehensive General Liability* (CGL), broad form coverage to the extent allowed under the applicable laws, including contractual liability, written on a standard policy;

2. *All-Risk Builder's Risk*<sup>32</sup> with an installation floater, insuring the risk of the owner, contractor, and subcontractors, written on the completed value basis in an amount not less than the Contract Price (including subcontracts) and all authorized and approved Change Orders;
3. *Business Automobile Liability* covering the operation of motor vehicles;
4. *Workers' Compensation* (minimum limits of coverage are usually required by state statute) and *Employer's Liability*; and
5. *Professional Liability* covering any design or other professional services to be rendered on behalf of the owner (for construction management, architectural, engineering, and design/build contracts).

People often confuse Commercial General Liability coverage (CGL) and Builder's Risk coverage. CGL is a type of liability policy which covers personal injury and property damage caused by a negligent act or omission of the contractor or those for whom it is legally responsible (e.g., its subcontractors). Although CGL policies generally exclude breach of contract claims, the *contractual liability* coverage that should be included in the CGL policy will cover such other claims or liabilities for which the contractor is responsible arising from contractor's contractual indemnity obligations. Indemnity clauses are meant to trigger the contractual liability coverage in the CGL. They must go hand-in-hand. However, many contractors and subcontractors are finding it increasingly difficult to obtain CGL coverage for claims arising from the negligence or fault of persons other than the insured or its subcontractors. When such coverage is not available, a broadly worded indemnity clause will not provide much, if any protection to the owner.

Owners should also require their contractors to provide an "additional insured" endorsement to the CGL policy. This makes the owner an insured under the contractor's CGL policy and gives the owner the right to make a direct, first-party claim against the CGL carrier for certain losses including, in certain circumstances, the right to require the contractor's CGL to furnish a defense in any legal action to those third-party claims. Until a few years ago, very broadly written additional insured endorsements were readily available. However, just as the contractual liability coverage in CGL policies has been restricted for many contractors and subcontractors for claims arising from broad-form and intermediate form indemnity clauses, the additional insured endorsements providing similar broad or intermediate form coverage are becoming increasingly difficult for some contractors and subcontractors to obtain. Because of this trend, some states have enacted statutory limitations on the right of owners and other parties to require contractors and subcontractors to provide additional insured endorsements on their CGL policies that purport to give first party insurance rights to an "indemnitee" or other third party to the extent of such indemnitee's or third party's fault or negligence. In 2011, the Texas Legislature enacted Chapter 151 of the Texas Insurance Code which imposes strict limitations on the enforceability of broad and intermediate form indemnity clauses and requirements for additional insured coverage.

In most circumstances, the CGL will not cover damages to the improvements being constructed. In other words, if a contractor's employee causes a fire which destroys the

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<sup>32</sup> "All Risk Builders Risk" insurance is also sometimes referred to as "Special Causes of Loss Builders Risk" insurance.

improvements being constructed, the CGL policy would not cover that loss (the CGL is designed to cover claims for personal injury in connection with the fire). The owner's standard property insurance on existing improvements will usually have an exclusion for improvements under construction. In other words, if an addition is being built to an existing structure, the property insurance on the existing structure will not cover any casualty loss to the addition. Therefore, a special type of property insurance is available and should be purchased to cover any such loss to the improvements being constructed — the builder's risk policy.

While some coverages (particularly, builder's risk) can be purchased either by the owner or the contractor, the contract should make it very clear who is responsible for providing the policy. Insurance coverage for the owner's benefit should be furnished so that the policy is in the owner's name or otherwise reflects that the owner is a named beneficiary and that the insurance is primary as to any other insurance the owner may carry. The contract should further provide that coverage should be written on forms and by carriers reasonably acceptable to the owner. Where the policy is furnished by the contractor and the owner is a named beneficiary, the policy or an endorsement to the policy must provide that the owner will be notified (actual notice) at least 30 days prior to cancellation of coverage or intent not to renew coverage.

**Special Note:** Given the importance of insurance and the complexity of insurance products available for construction projects, it is highly recommended that the insurance requirements set forth in the construction contract be prepared or reviewed by someone who is very knowledgeable and experienced with insurance matters. Also - just having a provision in the contract is not sufficient. An owner must follow through by obtaining the certificates of insurance to verify that the insurance coverage is in place as provided by the contract, and rigorously maintaining current insurance certificates for all designers and general / prime contractors active on the construction site.

Indemnity is a closely related issue. The contract should contain a provision in which the contractor indemnifies and holds the owner and its design professionals harmless from certain liabilities, primarily bodily injury and property damage to third parties, that might arise on the construction project.

In most standardized construction contract forms, the indemnity clause provides that the contractor indemnifies and holds the owner and its design professionals harmless to the extent that any claim, loss, or liability arising from an injury was caused in whole or in part by a negligent act or omission of the contractor or one of its subcontractors. This type of indemnity clause is usually referred to as a *comparative fault* indemnity clause because the contractor is only indemnifying the owner to the extent of the contractor's (or its subcontractors') comparative fault in connection with the claim, loss, or liability.

There are, of course, more onerous types of indemnity clauses. One occasionally encounters a *broad-form* indemnity clause. This is the clause that requires the contractor to indemnify the owner from any claim, loss, or liability arising out of the project, regardless of which party is at fault. In this type of clause, the contractor will actually be indemnifying and holding the owner harmless from any claim, loss, or liability, even if it arose or was caused by the owner's *sole* negligence. A variation of the *broad-form*

indemnity clause provides that the contractor must indemnify the owner even to the extent of the owner's partial negligence, but not from the owner's *sole* negligence. This somewhat less onerous variation is usually called an *intermediate* broad-form indemnity clause.

Prior to the enactment of Chapter 151 of the Texas Insurance Code in 2011, *broad form* indemnity clauses were enforceable in Texas, provided that they met the tests of the *express negligence* and the *fair notice* rules. In other words, such a clause would be enforceable only if the intent to indemnify the owner for its own negligence is expressed in specific terms within the four corners of the contract, and such indemnity language is conspicuous.<sup>33</sup>

Fundamentally, a broad form type of indemnity clause is meant to shift the burden of providing insurance for third party claims. As previously noted, this type of clause triggers the contractual liability coverage in the CGL policy and goes hand-in-hand with the endorsement to the CGL policy naming the owner as an additional insured. The rationale is that the large majority of claims arise from the activities of the contractor and its subcontractors and that the contractor is in the best position to control those risks. Further, an owner's "negligence" or fault may actually arise from the primary negligence or fault of the contractor. For example, an owner's liability to a third party could be based solely upon the owner's negligence in hiring the contractor or failing to monitor or supervise the contractor. In those latter situations, it would be unfair to prevent the owner from looking to the contractor for indemnification from such third party claims when the contractor owed a contractual duty to the owner to prevent such a loss or claim. However, broad form indemnity provisions can create inequitable situations, particularly where an owner has taken an active role in some facet of the project and the owner's acts or omissions cause or contribute to a claim. This inequity multiplies as broad-form indemnity obligations are passed down through the various tiers of subcontractors and sub-subcontractors on a project. Further, contractors and subcontractors are finding it increasingly difficult to insure against these risks, leaving them exposed to uninsured losses that can literally put them out of business.

In 2011, Texas joined the growing list of states that have imposed limitations on the enforceability of broad-form indemnity obligations and requirements for broad-form additional insured coverage. With the enactment of Chapter 151 of the Texas Insurance Code (which will be referred to herein as the "Texas Anti-Indemnity Statute"), *broad form* indemnity clauses (including *intermediate* broad form clauses) are no longer enforceable except in very limited situations. The most significant exceptions to the ban on broad form indemnity clauses are: (1) on-the-job personal injury claims by employees of the indemnitor and its subcontractors of any tier and (2) copyright infringement claims. Additionally, the statutory ban does not apply to contracts for certain residential projects and municipal construction projects. Also, these statutory restrictions apply only to contracts and subcontracts arising under "original contracts" between an owner and contractor, entered into on or after January 1, 2012.

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<sup>33</sup> *Ethyl Corp. v. Daniel Constr. Co.*, 725 S.W.2d 705 (Tex. 1987); *Atlantic Richfield Co. v. Petroleum Personnel, Inc.*, 768 S.W.2d 724 (Tex. 1989).

Under the Texas Anti-Indemnity Statute, for covered contracts and unless a specific statutory exception applies, insurance policy provisions and endorsements which purport to make the indemnitee an additional insured under the indemnitor's liability policy are not enforceable to the extent of any broad-form indemnity coverage. This limitation on additional insured coverage does not apply to a "consolidated insurance program" or so-called CCIP (*i.e.*, a wrap policy where the indemnitor and the indemnitees are all named insureds under the policy).

Further, contractual obligations to defend an indemnitee are subject to the same limitations. In other words, an indemnitor cannot be required to defend an indemnitee on claims to the extent of the indemnitee's negligence or fault. Because the decision to defend must be made prior to a determination of fault and based upon allegations in a pleading, contractual provisions requiring a contractor to defend an owner even if the owner is alleged to be negligent will no longer be enforceable for those types of contracts covered by Chapter 151 of the Insurance Code. This makes broad contractual language imposing an obligation on the part of the indemnitee to defend an indemnitor very problematic.

*Comparative* indemnity language found in most standard form construction contracts (such as the AIA A201 General Conditions) will probably comply with the restrictions of the Texas Anti-Indemnity Statute, but will provide relatively limited protection to owners. To the extent an owner wishes to expand the indemnity obligations of the contractor within limits still allowed under the Texas Anti-Indemnity Statute, great care must be exercised. Before attempting to expand a *comparative* indemnity clause or an additional insured endorsement requirement beyond the strict limits of the Texas Anti-Indemnity Statute, it is recommended that an attorney carefully study Chapter 151 of the Texas Property Code and read one or more commentaries regarding the latest statutory restrictions.

#### K. SURETY BONDS

When entering into a contract, an owner is faced with the decision whether to require the contractor to furnish a performance bond and a payment bond (they are separate bonds). These bonds will cost from 1% to 5% of the Contract Sum (or Guaranteed Maximum Price), depending upon the contractor's track record with the surety and the size of the bond.

An owner with a tight budget may well be tempted to save money by foregoing the bonding requirement. However, the owner with the tight budget is the very type of owner that most often needs the protection afforded by the surety bonds, particularly when the owner or its decision makers are not sophisticated or experienced with regard to construction related issues.

Surety bonds provide protection in several ways. First, sureties help the owner "pre-qualify" or screen contractors. By requiring the contractor to furnish a performance bond and statutory payment bond from a reputable surety (see discussion below concerning the "T-list"), the owner will cull out those contractors who lack the experience and financial resources which reputable sureties require of the contractors they bond. This is not to say

that sureties never write bonds for marginal contractors. However, the surety underwriting process can assist the owner in avoiding some of the more risky contractors.

The most obvious protection afforded by the surety bonds is the guarantee of the contractor's performance of the work and the payment of subcontractor and supplier obligations. Although contractor defaults are rare, when they occur, they can have catastrophic consequences for an owner. If the contractor fails to pay its subcontractors, despite payment from the owner, the owner may become liable to those unpaid subcontractors and suppliers and the property may be subject to mechanic's liens (see discussion below). Further, the cost of a replacement contractor, who often has to remove faulty work performed by a defaulted contractor before the contract work can be completed, can far exceed the original contract price. For an owner that has limited resources, a contractor default may lead to the owner's loss of the property to the lender or mechanic's lien claimants.

If an owner decides to require bonding, there are two bonds — the **performance bond** and the **payment bond** — that should be furnished by the contractor and surety to the owner. **It is very important that the owner receive both bonds.** Reputable sureties typically charge a single premium for both bonds and almost never issue one bond without the other. Occasionally, a contractor will attempt to furnish an owner with a single bond which covers both performance and payment obligations. **This combined payment and performance bond should never be accepted.** Under Texas laws, the combined bond would not meet the necessary statutory requirements and, therefore, would fail to provide sufficient protection to the owner. Further, it limits the owner's recovery to one penal sum which effectively cuts the coverage in half for the same premium charge.

In a performance bond, the surety obligates itself to the owner (the "obligee") that the contractor will complete its work in accordance with the underlying construction contract. The only party who can make a claim against the performance bond is the owner, unless the surety has agreed to add a named third party, such as the lender, to the bond or has issued a "dual obligee" rider to the bond which names such a third party. The contractor, of course, remains primarily liable to the owner for completing the contract; however, the surety obligates itself as a guarantor of the contractor's performance.

In Texas, there is no "standard" form of performance bond approved by the Texas Department of Insurance. Consequently, it is very important that the owner or its legal representative review the bond form to make sure that it provides the proper protection for the owner. The "penal sum" (stated limits) should be in the amount of the contract price. There should also be a provision in the bond which refers to the construction contract and which incorporates the contract by reference into the bond. Typically, the performance bond gives the surety certain options when the contractor has been "defaulted" by the owner (*i.e.*, the surety will have no obligation until and unless there has been a declaration of default by the owner). There may also be notice provisions which will become conditions precedent to a recovery against the surety. The owner should examine those provisions very carefully. The American Institute of Architects does publish a performance bond form which is sometimes furnished by contractors and sureties (AIA A312). This is not a particularly

owner-oriented bond form because it imposes notice requirements that can be onerous in some situations.

As stated previously, the payment bond is a separate bond which obligates the surety to pay the claims of those subcontractors and suppliers who furnish labor and materials for the work covered by the construction contract and who timely and properly perfect their claims. Payment bonds on private works projects are often regulated by state statutes, particularly where state law insulates the owner from mechanics' lien claims when the payment bond is furnished. In Texas, a payment bond does have to meet certain statutory requirements (see Chapter 53, Texas Property Code) in that it must be in a penal sum at least equal to the original contract amount, it must be in favor of the owner (the owner must be stated as the named "obligee" or beneficiary), and it must be conditioned on the contractor's prompt payment for all labor and materials furnished under the contract and all "normal and usual extras not exceeding 15 percent of the contract price." Further, the owner must endorse its written approval on the bond and it must be executed by the contractor and the surety. In other words, all three parties have to sign the bond. Although not required, it is highly advisable that the bond form contain some reference to the Property Code or, specifically, Chapter 53 thereof. Section 53.211 of the Property Code provides that the terms of the statute (Chapter 53 of the Property Code) will be read into the bond if the terms of the bond evidence an intent to comply with the requirements of the statute. Accordingly, a statement on the face of the bond that it is a "Property Code" bond or that it is furnished in attempted compliance with the terms of the Property Code may overcome some irregularities. However, section 53.211 of the Code may not overcome some defects, such as the failure of one of the parties to execute the bond or the failure to record the bond. The bond also must be recorded in the Real Property Records of the County in which the project is located, and the owner retain the original bond after recording.

Once a proper statutory bond is recorded, the bond will act to protect the owner from any mechanic's lien claims that may arise as a result of a subcontractor (or sub-subcontractor) not being paid. If a proper bond is filed, no mechanic's lien attaches to the owner's property and the owner has no personal liability. This does not mean that mechanic's lien affidavits will not or cannot be filed which purport to claim a lien against the property. However, a properly filed bond indemnifies the owner and the property, and no genuine cloud on the title should result from the filed mechanic's lien affidavits. Because the surety becomes responsible for those claims, it is very important that the owner forward any notices of claim or copies of lien affidavits to the contractor and the surety.

Under Texas law, for a payment bond over \$100,000 to be effective, the bond must be written by a surety that is listed by the U. S. Department of the Treasury ("T-listed") or any risk over the \$100,000 must be reinsured by a T-listed reinsurer.<sup>34</sup> The safer practice is to require a T-listed surety and enforce the requirement by verifying that the surety writing the bond is T-listed.

#### L. TERMINATION

As with most contracts, construction contracts typically have termination clauses that set out the grounds and procedures for parties to terminate the contract. The termination

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<sup>34</sup> TEX. INS. CODE, §3503.005.

provisions are particularly important in construction contracts because, when a problem does arise with a contractor, the owner needs to have the ability to remove the contractor as quickly as possible.

In drafting a construction contract on behalf of an owner, there are several concerns that need to be addressed. The grounds for termination by the contractor need to be specific and should be limited to material type defaults, such as the failure to pay contract funds within a certain time period after such funds become due and payable to the contractor, or the suspension of the work for some specified period of time. The contractor should be required to furnish reasonable notice (not less than 10 days) in order to give the owner an opportunity to cure the default. The contract should also set out the measure of recovery in the event of the contract's termination, such as payment for work performed to date of termination and lost profit. In connection with the lost profit figure, the contract could provide that lost profit shall be a specified percentage (*e.g.*, 5%) of any unpaid contract funds, or it can be computed in some other specified manner.

With regard to the owner's right of terminating the general contractor, the contract should specify the grounds for removal and termination of the contractor, including any substantial breach of the contractor's obligations under the contract, as well as the contractor's failure to make payments to subcontractors in accordance with the respective subcontracts; supply enough properly skilled workers or supervisors; and proceed continuously with construction for more than 10 consecutive days except as permitted by the contract or directed by the owner.

The owner should be able to terminate the contract after giving notice to the contractor (obviously, the notice period needs to be as short as the owner can negotiate). The contract should specify that the owner should have a full range of remedies upon termination for cause, including the right to take possession of the site and all materials, equipment, tools and machinery of the contractor's on the site and complete the work by whatever reasonable method the owner may deem expedient.

One term that many of the standardized form contracts omit is a *termination for convenience* clause. An owner should be given the option in the construction contract to terminate the contract for its convenience (*i.e.*, without cause). Typically, the notice period before termination is somewhat longer than for a termination for cause (10 days instead of 3 days) and the owner does not have the right under the contract to take possession of the contractor's materials, equipment, tools and machinery on site. Further, the contract usually provides that the contractor will be reimbursed for work performed to date of termination. Occasionally, the contracts also require the owner to reimburse or pay the contractor for any actual costs or losses incurred by the contractor from third-party claims resulting from the early termination and for some amount of lost profit relative to the remaining work on the project.

The advantage to a termination for convenience clause is that, unless the contractor has clearly breached the contract, the owner can terminate the contract without having to establish "cause" and avoid some of the liability which might arise from a wrongful termination.

## M. DISPUTE RESOLUTION

Arbitration has been a favored method of resolving construction disputes since long before "alternative dispute resolution" procedures became fashionable. A construction claim can be highly technical and paper intensive. Arbitration is well-suited to resolving such disputes because the parties have an opportunity to select arbitrators who, at the very least, are knowledgeable in construction practices and capable of understanding the issues.

Many of the standardized construction contract forms provide for mandatory, binding arbitration, usually in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association (AAA).

As a general rule, mandatory, binding arbitration is a relatively efficient and reliable method of resolving the complex and technical disputes that can arise on a construction project. On the other hand, an owner may believe that the benefit of having a local judge and jury rule on any issues in dispute outweighs the efficiency and reliability of an arbitration. In such a case, the arbitration provisions which are included in most standardized construction contracts should be deleted.

Additionally, it is very important that the owner make sure that any mandatory dispute resolution procedures (whether they be mandatory mediation and/or arbitration or waivers of jury trials, if such waivers are enforceable under applicable law) are consistent throughout all design, consulting, and construction contracts on a particular project. Further, express language should be included in each contract which gives the owner the right to join all parties in such a proceeding that are needed for the full and just adjudication of all claims. The last thing an owner needs is for its architectural agreement to call for litigation and its construction contract to call for mandatory arbitration, or for one of the agreements to include language that requires both parties' agreements to be joined in an action with another party. In either case, an owner facing a claim asserted by a third party or some other defect in the Work could find itself having to bring two separate actions against its design professionals and its contractor. That not only doubles the cost, but it could result in inconsistent results (*i.e.*, the jury could find that the contractor was responsible in the trial against the architect, and the arbitrator could find that the architect was responsible in the arbitration against the contractor... resulting in no recovery by the innocent owner).

**Arbitration vs. Litigation Costs.** Bottom line up front: When comparing the total costs of litigating a case versus arbitrating one, they tend to come out about the same.

The pretrial phase of litigation is more expensive than arbitration, because the litigating parties have more procedural tools available for discovery and there are prescriptive requirements for pretrial practices such as filing motions. These procedures are conducted at the court and can take a considerable amount of time (which attorneys bill for). By contrast, arbitration pre-hearing motions are generally discouraged.

When pre-hearing (pretrial) motions are filed in arbitration, hearings are conducted virtually online which significantly reduces the amount of time and cost for such. Also, the limited

discovery in arbitration greatly reduces the expenses incurred during this phase of the process. Although the arbitration pre-hearing phase is less costly than in litigation, the reverse is true for the hearing phase. Trial costs at state or federal court include attorney's fees, reproduction of exhibits, expert witness fees, and other costs necessary to present the evidence supporting their respective positions. The parties can expect the same costs in arbitration, in addition to the cost of the arbitrator(s) to administer the pre-hearing portion of the case, as well as the hearing and preparation of an award. If a panel of three arbitrators are used, the cost is multiplied by three. Generally, the cost of arbitration tends to be about the same as litigation. Of course, each case is different, and the costs can vary from one extreme to another, depending upon the circumstances.

**Appellate Review.** When one or more parties are unsatisfied with the decision of a judge or jury, they may be entitled to file an appeal with a different court to review any errors of fact or law they believe may have been committed by the court or jury, or both. The same is true with regard to arbitration awards, which can be challenged by filing an application with a court having jurisdiction. However, any appeal from an arbitration award is more limited, and is usually reserved for issues such as the arbitrator's award being "procured by corruption, fraud, or other undue means."<sup>35</sup> Even under the best circumstances, the chances of getting a different result on appeal are very difficult, regardless of whether the original case was decided by a judge, jury or arbitrator.

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<sup>35</sup> See: *Admire v. Capital West Securities, Inc.*, July 03, 2012, Oklahoma Court of Civil Appeals, Div. No. 2, and Oklahoma Stat. tit. 12, §1874(A) Application to Vacate an Award.

## APPENDIX

### QUICK REFERENCE GUIDE TO THE AIA FAMILY OF DOCUMENTS

(Current at time of publication: June 2025)

#### CONVENTIONAL OWNER – ARCHITECT FORMS:

**B101-2017 Standard Form of Agreement Between Owner and Architect.** Starting in 2018, this edition replaced the previous version B101-2007. Traditionally this has been the “work-horse” form of Owner Architect Agreement, with revisions, for use on commercial projects. This form of Agreement lends itself to be revised for use in various project delivery methods including DBB, CMAR, etc. See also: B133-2019 below. The B101-2017 form of Owner Architect Agreement is intended to be used with the A201-2017 General Conditions of the Contract for Construction.

**B102-2017 Standard Form of Agreement Between Owner and Architect Without a Predefined Scope of Architectural Services.** Starting in 2018 this edition replaced the previous version B102-2007. Substantive provisions are similar to those in the B101, except that all provisions defining the architect’s scope of services have been removed. This form is intended to be used when the parties have agreed to a separate document setting forth the architect’s scope of services.

**B103-2017 Standard Form of Agreement Between Owner and Architect for a Complex Project.** Starting in 2018, this edition replaced the previous version B103-2007. A somewhat expanded version of the B101, this template is intended to be used on large projects, particularly those involving fast track construction.

**B109-2020 Standard Form of Agreement Between Owner and Architect for a Multi-Family Residential or Mixed-Use Residential Project.** The previous version, B109-2007 was phased out in 2017. However, this 2020 edition replaces and supplants all previous versions which are no longer supported by the AIA.

**B133-2019 Standard Form of Agreement Between Owner and Architect, Construction Manager as Constructor Edition.** This template arose out of increasing use of the CMAR project delivery method, when the Owner employs a Construction Manager (CM) to act as an adviser during the preconstruction phase by providing cost estimates, schedules and constructability advice which may include subcontractor design-assist services. At a mutually agreed-upon time, when requested by the Owner, the CM prepares a GMP proposal or Control Estimate for the Owner’s approval, after which the CM constructs the project, and the Architect provides CA services. The B133-2019 form of Owner Architect Agreement is intended to be used with the A201-2017 General Conditions of the Contract for Construction which marries to either the A133-2019 CMc where the pricing mechanism is a GMP, or the A134-2019 CMc where the pricing mechanism is the Cost of Work Plus a Fee without a GMP.

## OWNER – ARCHITECT FORMS FOR SMALLER PROJECTS:

### **B104-2017 Standard Form of Agreement Between Owner and Architect for a Project of Limited Scope.**

This is an abbreviated version of the B101 for projects with limited scope and complexity. It is intended to be used with the A104-2017 Owner – Contractor Agreement.

**B105-2017 Standard Short Form of Agreement Between Owner and Architect.** This template is meant for use on residential or very small commercial projects, in conjunction with the A105-2017 Owner – Contractor Agreement.

**B133-2019 Standard Form of Agreement Between Owner and Architect, Construction Manager as Constructor Edition.** This template was created to run with the A133-2019 (see reference below), when the Contractor is performing preconstruction services as a “Construction Manager”.

## CONVENTIONAL OWNER – CONTRACTOR CONSTRUCTION CONTRACT FORMS:

**A101-2017 Standard Form of Agreement Between Owner and Contractor Where the Basis of Payments is a Stipulated Sum.** Intended for use with A201-2017 General Conditions. Starting in 2018, this 2017 edition of the A101 replaced the previous A101-2007.

**A102-2017 Standard Form of Agreement Between Owner and Contractor Where the Basis of Payments is the Cost of Work Plus a Fee With a Guaranteed Maximum Price.** Intended for use with A201-2017 General Conditions. Starting in 2018, this 2017 edition of the A102 replaced the previous A102-2007.

**A103-2017 Standard Form of Agreement Between Owner and Contractor Where the Basis of Payments is the Cost of Work Plus a Fee Without a Guaranteed Maximum Price.** Frankly I am mystified why any owner would hire a contractor for a “cost plus fee” arrangement without a GMP. Nevertheless, the AIA has produced this document. Intended for use with A201-2017 General Conditions. Starting in 2018, this 2017 edition of the A103 replaced the previous A103-2007.

**A133-2019 Standard Form of Agreement Between Owner and Construction Manager as Constructor, Where the Basis of Payment is the Cost of Work Plus a Fee With a Guaranteed Maximum Price.** This is the form of agreement between the Owner and the Contractor, when the Contractor is performing preconstruction services as a “Construction Manager” and payment is based upon the cost of the work, plus a fee, with a guaranteed maximum price (GMP).

**A134-2019 Standard Form of Agreement Between Owner and Construction Manager as Constructor, Where the Basis of Payment is the Cost of Work Plus a Fee Without a Guaranteed Maximum Price.** This is the form of agreement to use when the contractor is performing preconstruction services as “Construction Manager” and payment is based upon the cost of work plus a fee, but without a GMP. As with the A103, I am mystified as to why any owner would agree to hire a contractor for a “cost plus fee” arrangement without a GMP. Intended for use with A201-2017.

**A201-2017 General Conditions of the Contract for Construction.** Starting in 2018, this edition replaced the previous A201-2007. The AIA no longer supports the digital version of A201-2007, or previous versions.

## OWNER – CONTRACTOR CONSTRUCTION CONTRACT FORMS FOR SMALL PROJECTS:

**A104-2017 Standard Form of Agreement Between Owner and Contractor for a Project of Limited Scope.** This template form is design for use where the basis of payment is either a stipulated sum or a cost plus fee with or without a Guaranteed Maximum Price. This form contains its own internal General Conditions so it is not intended for use with A201-2017. For smaller projects, this is probably a better form than the A105-2017 noted below, particularly if the internal General Conditions are expanded somewhat.

**A105-2017 Standard Form of Agreement Between Owner and Contractor for a Residential or Small Commercial Project.** This is one of two forms (along with the A104 – see above) recommended for smaller projects. Between those two forms, the A105-2017 is the most abbreviated form of agreement and probably should not be used by an owner except in very specific or unusual situations.

## OWNER – CONSTRUCTION MANAGER “ADVISOR” (AGENT) FAMILY OF CONTRACT FORMS:

**A132-2019 Standard Form of Agreement Between Owner and Contractor, Construction Manager as Adviser Edition.** This rarely – used form of agreement between the owner and contractor was developed for situations when the owner has already entered into another (C132-2019) agreement with a separate Construction Manager Adviser to perform construction management services. This A132-2019 is meant to be used in place of the A101-2017 or the A102-2017 (depending upon the basis of payment). However, with some modification, the A101-2017 and A102-2017 can still be used instead of the A132-2009.

**A232-2019 General Conditions of the Contract for Construction, Construction Manager as Adviser Edition.** This General Conditions document is intended for use with the A132-2019, when the owner has contracted with a Construction Manager Agent.

**B132-2019 Standard Form of Agreement Between Owner and Architect, Construction Manager as Adviser Edition.** This form of agreement between the owner and architect is meant for use when the owner has entered into an agreement (C132-2019) with a separate Construction Manager Adviser to perform construction management services.

**C132-2019 Standard Form of Agreement Between Owner and Construction Manager, Construction Manager as Adviser Edition.** This is the agreement running between the owner and Construction Manager Adviser to perform construction management services. It is intended to be used with the A132-2019 / A232-2019 and the B132-2019 documents. However, other more conventional AIA forms of agreement can be used with some modifications.

## DESIGN – BUILD FAMILY OF CONTRACT FORMS:

**A141-2024 Standard Form of Agreement Between Owner and Design-Builder – Traditional Design-Build Project.** This is the agreement running between the owner and the entity serving as the Design-Builder for design and construction of the project. It consists of the Agreement, Exhibit A (Insurance and Bonds), Exhibit B (Design-Build Amendment containing the Contract Sum), and Exhibit C (Sustainable Projects).

**A141 PDB-2024 Standard Form of Agreement Between Owner and Design-Builder – Progressive Design-Build Project.** This is a modified version of the A141-2024, and is intended for use on progressive design-build projects. Progressive Design-Build involves a more collaborative and phased approach, wherein the owner has more control than in the traditional Design-Build method. The A141 PDB-2024 consists of the Agreement, Exhibit A (Insurance and Bonds), Exhibit B (Design-Build Amendment containing the Contract Sum), and Exhibit C (Sustainable Projects).

**A142-2014 Standard Form of Agreement Between Design-Builder and Contractor.** This is the agreement running between the entity serving as the Design-Builder and the entity serving as the General Contractor. This form is typically used when the Design-Builder and the Contractor are separate entities.

**B143-2014 Standard Form of Agreement Between Design-Builder and Architect.** This is the agreement between the entity serving as the Design-Builder and the entity serving as the Architect. This form is typically used when the Design-Builder and the Architect are separate entities.

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